

Civil Mediation, How To Kick-Start It; The Italian Experience

Training, compulsory, tax relieves, control

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He worked as a bank officer, specialized in assessing and managing risk, especially the uncertainly realized. He has been a civil mediator certified by the Ministry of Justice since 2006 and a trainer since 2011; he operates as a mediator at the Chamber of Commerce of Grosseto, Conciliatore BancarioFinanziario and ADRCenter, and as a trainer at Risorsa cittadino s.c.s e Arbimedia s.r.l. . He specializes in the use of mediation to prevent conflict in the event of corporate financial crisis. He trained in Online Dispute Resolution with Virtualmediationlab-Hawaii.

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ABSTRACT: According to the European Parliament (12.9.2017) "*Italy uses mediation at a rate six times higher than the rest of Europe*". Mandatory mediation was ruled in 2010 in Italy and came in force in 2011. In 2013 the "Opt-Out" model was introduced. Results:

year 2011 - 60,810 proceedings, 9,912 agreements, 16% success rate.

year 2016 - 183,977 proceedings, 20,237 agreements, 11% success rate.

20,237 is the highest number of agreements through mediation ever reached in Italy, thanks to:

- the judges and the controls carried out by the Ministry of Justice on the mediation bodies;

- statistics available at a nationwide level, which allow to check on the results;
- the stubbornness of those who believe in mediation, who often work for free.

Nevertheless the success rate scored in 2016 is still far away from that realized in 2011, mainly because a worsening in the quality of training during the 2010/2011 period. The most efficient mediation bodies, in addition to the courses required by the law, have realized further training and are achieving far higher results than the average.

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1 . INTRODUCTION

The European Parliament, in the resolution of 12.9.2017, states: “ ...

A. whereas Directive 2008/52/EC has been an important milestone with regard to the introduction and use of mediation procedures in the European Union;

F. whereas the objectives stated in Article 1 of the Mediation Directive aimed at encouraging the use of mediation and in particular at achieving a ‘balanced relationship between mediation and judicial proceedings’ have clearly not been achieved, as mediation is used in less than 1 % of the cases in court on average in the majority of Member States; ...

“ calls on the Member States to step up their efforts to encourage the use of mediation in civil and commercial disputes;

“ calls on the Commission

- to assess the need to develop EU-wide quality standards for the provision of mediation services, especially in the form of minimum standards ensuring consistency ... ;

- to create and maintain –in each Member State- national registers of mediated proceedings

to undertake a detailed study on the obstacles to the free circulation of foreign mediation agreements in the Union ... ;

- to extend ... the scope of mediation also to other civil or administrative matters ... ;

“ regrets the difficulty of obtaining comprehensive statistical data on mediation, including the number of mediated cases, the average length and success rates of mediation processes” ¹ .

But, first of all, in order to spread the use of mediation all over Europe, I think that the European Commission should advice a minimum standard of a highly qualified training course in ADR to be shared in all Member States. The European Parliament underlines that “*Italy uses mediation at a rate six times higher than the rest of Europe*”; nevertheless, in this Country, the sharp fall in quality of training in 2010 / 2011 has caused serious consequences.

On March 21st, 2011, mandatory mediation took off in Italy. The initial results were encouraging: 31% of proceedings saw all parties present and the success rate was 54%; a final agreement was achieved in 16% of mediations (9.912). Over time, the number of proceedings increased but (all parties present) the success rate declined from 59% at the beginning of 2011 to 38% at the end of 2012.

Year 2016 year scored the highest number of mediation agreements (20,237) ever reached in Italy but the success rates (all parties present 43%; final agreement 11%) were far away from those scored in 2011.

2 . MAIN STATISTICAL FIGURES

Civil and commercial mediation has been compulsory in Italy since 2011. More precisely

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

¹ EU – European Parliament, Tuesday, 12 September 2017, Strasbourg “Implementation of mediation directive” <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0321+0+DOC+XML+V0//EN>
 Quantifying the cost of not using mediation – a data analysis. 2011
http://www.adrceninterinternational.com/wp-content/uploads/2015/07/Paper-EU-Parliament-Giuseppe-De-Palo-dox_.pdf
 Rebooting the Mediation Directive: Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU; 2014
http://www.adrceninterinternational.com/wp-content/uploads/2015/07/IPOL-JURI_ET2014493042_EN.pdf
 The implementation of the Mediation Directive – 29 November 2016
<http://www.adrceninterinternational.com/balanced-relationship-mediation.pdf>
 Study for an evaluation and implementation of Directive 2008 / 52 / EC – the “Mediation Directive – 2013/2016
<https://publications.europa.eu/it/publication-detail/-/publication/bba3871d-223b-11e6-86d0-01aa75ed71a1>

	Mediation			<i>Civil</i>	<i>proceedings</i>
	Proceedings	Agreements	Agreements success rate	<i>Registered</i>	<i>Pending</i>
2011*	60,810	9,912	16%	<i>4,409,000</i>	<i>5,566,000</i>
2012	154,879	16,727	11%	<i>4,267,000</i>	<i>5,081,000</i>
2013	41,604	5,408	13%	<i>4,389,000</i>	<i>5,155,000</i>
2014	179,587	16,162	9%	<i>4,009,000</i>	<i>4,359,000</i>
2015	196,247	19,625	10%	<i>3,334,000</i>	<i>3,945,000</i>
2016	183,977	20,237	11%	<i>3,472,000</i>	<i>3,803,000</i>

*21.3 / 31.12.2011

The conflicts subjected to mandatory mediation are only the 8% of all the conflict filed in Italian courts; their filing had a 9% increase from October 2012 to September 2013, when mediation was voluntary (footnote 2, period *D*) and a 15% decrease after September 2013, when mandatory mediation was back (footnote 2, period *E*²).

2 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;

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;

Cases discussed in Tribunals		
From 2013 to 2015	All civil proceedings	Proceedings related to civil mediation
	-8%	-16%

Therefore (compulsory) mediation “works”, but the overall success rate is still too low, only 11%. Why ?

In order to kick-start mediation (and ADR), it is necessary to have clear goals to be reached, a very good training, a strong attention to the “stakeholders” (people, lawyers, judges), their attitudes and interests, and to control what is going on. Starting with the knowledge of the historical framework.

3 . A BIT OF HISTORY

Mediation belongs to the Italian cultural and juridical 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). 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, supported by the Ital-

- pre-mediation first meeting, free of charge, with an “opt out” mechanism.

ian doctrine of the early twentieth century, and rejected by the bankruptcy law passed by fascism in 1942³.

Since the 30's 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, by the potential users (people) and by the professionals (lawyers and judges).

In 1993 the Law 580 ruled: each Italian Chamber of Commerce had to set up a conciliation (and arbitration) chamber. 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. Mediation bodies were ruled; lawyers and no lawyers could be mediators. Specific training requirements, especially on communication, were very modest. Nobody (*rectius*, no lawyer) used it, and when I asked why, lawyers replied: "*Because it was not compulsory*".

There were a high number of litigation cases, long lasting litigation cases, a huge numbers of lawyers (with decreasing revenues), a "*shrinking*" in the litigation market (the number of new civil proceedings has decreased due to the economic crisis started in 2008, the length of proceedings and the increase in court fees)⁴ and a tremendous number of pending civil litigation cases in the overall judicial system (5,700,000 in 2009).

3 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" 21.2.2013 <http://www.adrmaremma.it/matteucci25.pdf> or http://www.ilfallimentarista.it/insolvenza_negoziazione_sguardo_storico

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

"The decrease in case filings. According to the year-end forecasts ... 2014 recorded a significant positive balance: in practice, the civil courts of first instance delivered 330,000 judgments more compared to the disputes initiated by citizens and businesses. The result depends on the fall in new cases (-4.2% over 2013) and the increase in the decisions of judges (+3.9%). In other words: less litigation and more ruling.

"There is no clear diagnosis of the reasons for the decline in filings. In addition to the likely impact of the crisis on trade and thus litigation, in 2014 some measures for alternative dispute settlement were introduced, such as arbitration, assisted negotiation and mediation that have lightened the courts", said Fabio Bartolomeo director general of statistics at the Ministry of Justice.

"In fact, last year there has been the best result since 2008, bringing the potential backlog of civil courts as of December 31 under the threshold of 3 million cases. A number of dossiers which is still impressive - certainly - but progressing at this rate it could be zeroed in nine years. Which are many, but represent a "measurable" period, especially when compared with the projections referred to the pace of disposal recorded in 2012 and 2013, which were three times longer".

- Dell'Oste Cristiano, Finizio Michela and Mazzei Bianca Lucia, "Less litigation (-4.2%) and more rulings (+3.9%) are reducing the civil justice backlog", in *Il Sole 24 Ore*, 10.08.2015

<http://www.italy24.ilsole24ore.com/art/laws-and-taxes/2015-08-05/less-litigation-42percento-and-more-rulings-39percento-are-reducing-the-civil-justice-backlog-095331.php?uqid=ACpyqBd&cmpid=boxhp>

4 . MANDATORY MEDIATION APPROVED (2010), UNCONSTITUTIONAL DECLARED (2012), REINTRODUCED (2013)

In 2010 the compulsory civil and commercial mediation was ruled by Legislative Decree no 28/2010), starting from March 2011, in many civil matters ⁵ ; it was declared unconstitutional in October 2012 and reintroduced in September 2013. It had to face a furious opposition by lawyers (a matter of culture and revenues – ADR, here, doesn't mean Alternative Dispute Resolutions, rather *Alarming Drops in Revenues*) and -until 2013- a benign neglect by judges (a matter of culture). 50 hours of training (too few) were established, with specific attention to communication; graduates in any subject could become mediators (also non-graduates, but only on matters related to their activities). In Italy civil and commercial mediation took-off : from March 21 to December 31, 2011 : registered proceedings 60.810, all parties present in 31% of proceedings, agreements 9.912 (with a success rate of 16%), two to three months 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.

On December 12th, 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. The number of mediation proceedings dropped, voluntary mediation survived, with a much higher success rate than the compulsory one.

Under the 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 20th, 2013.

But the heavy pressure exerted by lawyers on the members of Parliament led to significant changes from the previous law. Among others :

- lawyers mediators "ope legis" (and for almost two years they were asked to attend only a 15 hours training)

⁵ Rights in rem, property; division of assets, partition; wills and inheritance; family covenants and agreements; lease; gratuitous loans; business rents; civil liability for medical malpractice; civil liability for defamation in the press or other media; insurance, banking and financial contracts; condominium. Interim and preventive procedures (injunction proceedings, notice to quit, possessory proceedings, civil action inside the criminal proceedings, etc.) were exempted from the mandatory attempt at mediation. The conflicts subjected to mandatory mediation are the 8% of all the conflicts filed in Italian courts.

- compulsory lawyers' assistance (presence) for the parties;
- the first "informative" meeting free of charge (except for a 48,80 euro fee, 97,60 if mediation value is higher than 250,000 euro – 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, attend the first informative meeting, can "OPT-OUT" from the process ⁶ .

5 . NEW RULES IN 2014 / 15

New rules came in force in 2014 and 2015:

- cases pending before the court, upon the parties' agreement, can be transferred in arbitration;

- assisted negotiation by lawyers : for disputes relating to compensation for damages caused by cars and boats and for all claims for payments up to 50,000.00 euro (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 ⁷ ;

- who loses in court will refund the expenses of the process;

- a high statutory rate of interest for late payment will be provided, to an extent at least equal to the market price; 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.

6 . MEDIATION BODIES ("ORGANISMI DI MEDIAZIONE") AND THE MINISTRY OF JUSTICE

In Italy mediators are allowed to operate only within the mediation bodies, ruled by the Ministerial Decree 180 / 2010 ⁸ , updated by Minis-

6 D'Urso Leonardo and Canezza Romina, "The Italian Mediation Law on Civil and Commercial Disputes", a description of the mediation procedure under the Legislative Decree 28/2010 and the Ministerial Decree 180/ 2010, along with the translation of the laws in English www.mondoadrit/wp-content/uploads/The-Italian-Mediation-Law.pdf

7 Legislative Decree 132, September 12, 2014 art. 1 and art. 2, converted with amendments by Law 162/ 2014, ruled the transfer in arbitration and the assisted negotiation, both institute strongly supported by lawyers. Results in 2016: proceedings 43.000; agreements 4.132 (separations and divorces 3.197). With respect to the mediation a much wider field of application, but inferior results. No news about transfer in arbitration.

<http://www.consiglionazionaleforense.it/documents/20182/321984/Monitoraggio+negoziatore+assistita+2016+-+Dati.pdf/8adb4fb2-45ec-4a8c-943a-55918435cb81?version=1.0> .

8 <http://www.adrmaremma.it/norm17.pdf>

terial Decree 145 / 2011 ⁹ . “*Organismo di mediazione: l’ente pubblico o privato, o la sua articolazione, presso cui può svolgersi il procedimento ai sensi del decreto legislativo 18/2010*”- “*Mediation body: public or private institution, or its branch, where the mediation proceedings can take place under Decree 28/2010*”.

We are talking about

- public institutions (also ruled by foreign law): chamber of commerce, council of professional bodies (not only lawyers), universities, etc. and
- private institutions.

A mediation body must have a registered capital amounting to a minimum sum required for setting up a small joint-stock companies, an insurance policy for an amount not lower than 500,000.00 euro and an independent accounting. It applies for registration to the Ministry of Justice, which manages the register of mediation bodies and the register of mediators. The rates of the proceedings are established by the Ministry and are paid by the parties to the mediation body, which pays the mediator.

There is an administrator (who can not be a mediator) and, at least, five mediators, who ask to join the mediation body. The administrator must assign the proceedings to mediators based on their bachelor’s degree and specialization; and on rotation. The mediation body must publicise its own regulation and the names and experiences of mediators on a website. The parties, together, they can choose the mediator. The body may conduct its activities in all matters prescribed by the law, but also limit its work to a few (or even one).

There is no contribution by the State, except legal aid, the assistance provided to those who cannot afford the fees to initiate court proceedings or to defend themselves before a court.

The documents of every proceeding must be sent to the Ministry and the number of initiated proceedings, the results, those not yet completed and much more must be communicated every quarter.

The Ministry of Justice controls mediation bodies and mediators: in 2016 there were 1,050 registered organizations; between 2014 and 2016, “*one quarter of the mediation bodies have been canceled. ... the number of deleted organisms was almost seven times higher than the number of new registered organisms. ... inspections carried out - amounting to 125 - resulted in*

⁹ <http://www.adrmaremma.it/norm24.pdf>

the cancellation or suspension of almost half of the mediation bodies” ¹⁰ .

There is no national organization of mediators.

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. But 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 ;

- “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 “integrated” conciliatory practices started in 2011 at the Court of Modugno-Bari

- 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 invitation to mediation in the 2012 – 2013 period, Judge Moriconi achieved a reduction of at least 10% of the disputes entrusted to him ¹¹ .

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.

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

¹⁰ Ministero della Giustizia, Direzione Generale della Giustizia civile : nel 2016 c'erano 1.050 organismi iscritti; tra il 2014 ed il 2016 “un quarto degli organismi è stato cancellato. .. il numero di organismi cancellati è stato superiore di quasi sette volte quello dei nuovi organismi iscritti. .. le ispezioni di controllo effettuate –pari a 125- hanno condotto alla cancellazione o la sospensione di quasi la metà degli organismi di mediazione”, in Commissione di studio per l'elaborazione di ipotesi di organica disciplina e riforma degli strumenti di degiurisdizionalizzazione, con particolare riguardo alla mediazione, alla negoziazione assistita e all'arbitrato (Pres. ALPA), page 151, 2017 <http://www.adrmaremma.it/norm76.pdf> . The translation into English of this provision is mine.

¹¹ <http://www.mondoadr.it/cms/articoli/resoconto-del-convegno-il-ruolo-del-giudice-nella-mediazione.html>

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 used these opportunities in about fifty cases ¹² ; 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 did not attend the first informative meeting, or attended 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*”.

From September 23rd, 2013 to October 10th, 2014, new rules, the above-mentioned Judge Moriconi presided over about 700 cases; according to him, ADR methods could be used in almost 200 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. 8% reduction of the disputes entrusted to him ¹³ .

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 . TRAINING

Training can be seen as the Achilles’ heel of Italian mediation proceedings ¹⁴ .

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);

¹² For further information see www.adrmaremma.it , Italian section, News.

¹³ <http://www.adrmaremma.it/news199.pdf>

¹⁴ Matteucci Giovanni, “Mediazione avanti tutta ma ... la formazione? – Mediation, go ahead; but...training?” January 30th, 2012 <http://www.altalex.com/index.php?idnot=16703>

Riccardi Carlo, “Formare alla mediazione”, July 21st, 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, in 2010 / 2011 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 21st, 2011, mandatory mediation took off. The initial results were encouraging: only 31% 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 54%. A final agreement was achieved in 16% of mediations (Table 10). 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, from 59% at the beginning of 2011 to 38% at the end of 2012 (table 10).

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 813 mediation bodies ¹⁵; at least 5 professionals per mediation body (in some structure also more than 100), on the whole not less than 60/70.000 mediators (mainly lawyers) ¹⁶; 60.810 proceedings. There were more mediators than mediations.

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 2010, 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 with poor training; the consequences were deterioration in the quality of the mediation process management and worse results.

As already quoted, the success rate of the proceedings, where all parties were present, dropped from 59% at the beginning of 2011 to 38% at the end of 2012. On December 12th, 2012, the Constitutional Court declared the unconstitutionality of compulsory mediation; as a consequence, in 2013 there were mainly voluntary mediations, with a sharp decrease in the number and an (obvious) increase in the success rate. Compulsory mediation was reintroduced in 2014 and the situation started to recover, thanks to the

¹⁵ Mediation bodies : 813 in 2011, 986 in 2012, 778 in 2016.

¹⁶ 22,786 mediators on February 2017; Ministero della Giustizia, Albo dei mediatori - Ministry of Justice, List of mediators.

judges and the inspections carried out by the Ministry of Justice. Lawyers started to realize they can make a profit out of mediation, especially in times of economic downturn, when companies need to solve their problems in order to get money. Tax benefits have been formally introduced but are not operational. Statistics at a national level have allowed to check on the results. Universities have started to give attention to ADR training: the Italian competition on mediation (Milan, Chamber of Commerce) in 2012 was attended by 4 universities; in February 2017, there were 24 universities and 120 students all highly trained. The most efficient mediation bodies, where there is a continuous training, achieve far superior results to the average (tabel 10, Chamber of Commerce in Milan). 2016 scored the highest number of mediation agreements ever reached in Italy, but the success rates achieved in 2011 are still far away.

9 . CONCLUSIONS

According to the European Parliament “*Italy uses mediation at a rate six times higher than the rest of Europe*”. Mandatory mediation was ruled in 2010 in Italy and came in force in 2011; mediation took-off. In 2013 the “Opt-Out” model was introduced ¹⁷ , taking into account the needs of the different mediation stakeholders: lawyers (mainly), judges, contending parties.

Results :

year 2011 - 60,810 proceedings, 9,912 agreements, 16% success rate.

year 2016 - 183,977 proceedings, 20,237 agreements, 11% success rate.

20,237 is the highest number of agreements through mediation ever reached in Italy, thanks to:

- the judges and the controls carried out by the Ministry of Justice on the mediation bodies;
- statistics available at a nationwide level, which allow to check on the results;
- the stubbornness of those who believe in mediation, who often work for free.

Nevertheless the success rate scored in 2016 is still far behind what was from that realized in 2011, mainly –according to my opinion- because of a worsening in the quality of training during the 2010/2011 period. The most efficient mediation bodies, in addition to the courses required by the

¹⁷ See footnote 6.

law, have realized further training and are achieving far higher results than the average.

50 hours training have proved insufficient¹⁸; at least 200 hours would be necessary, and not only law experts but also communication experts, psychologists, bankers, etc. should be involved, because ADRs are a mixture of very different skills. This idea could be useful to implement the Mediation Directive in the European Union and the Commission should advice a minimum standard of a highly qualified training course to be shared in all Member States.

Giovanni Matteucci

Table 1

CIVIL AND COMMERCIAL MEDIATION IN ITALY						
	Incoming mediations proceedings	The invited party present	Agreement	Agreement	Agreement	Agreement
			success rate when parties go further [1]	success rate when parties do NOT go further [2]	overall success rate [3]	absolute values [4]
	A	B	C	D	$B \times C = E$	$A \times E = F$
					$B \times D = E$	
2011*	60,810	31%	53%	[1]	16%	9,730
2012	154,879	27%	41%	[1]	11%	17,037
2013	41,604	32%	49%	[1]	16%	6,657
2014	179,587	40%	47%	23%	9%	16,162
2015	196,247	45%	43%	22%	10%	19,625
2016	183,977	47%	43%	24%	11%	20,237
* 21.3 / 31.12.2011						
[1] In 2011, 2012 and until September 19, 2013 the first information meeting was not required						
[2] Success rate when parties go further than the first information meeting						
[3] Success rate when parties do NOT go further the first information meeting						
[4] Overall success rate, including mediations in which invited party is not present and those in which parties do NOT go further the first information meeting.						

18 Greg Bond, "What Is a "Certified Mediator" ? New Regulation in Germany Published", Kluwermediationblog, 27.9.2016 <http://kluwermediationblog.com/2016/09/27/what-is-a-certified-mediator-new-regulation-in-germany-published/>

	Initial pending proceedings	Incoming proceedings	Resolved proceedings	Final pending proceedings	Agreements overall success rate	Agreements absolute values
	G	H	I	L	E	I x E = M
2011*	742	60.810	40.162	21.390	16%	6.425
2012	21.390	154.879	152.631	23.638	11%	16.789
2013	23.638	41.604	24.019	41.222	16%	3.843
2014	41.223	179.587	156.317	64.493	9%	14.068
2015	64.493	196.247	185.745	74.995	10%	18.574
2016	74.995	183.977	173.474	85.499	11%	19.082

*21.3 / 31.12.2011

Table 2

Comparison between cases discussed in the Tribunals and those discussed in mediation		
From 2013 to 2015	All civil proceedings	Proceeding relating to civil mediation
	- 8 %	- 16 %

Matters relating 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 filed in the courts		Incoming mediations	
2011	209,572	60,810	
2012	209,024 - 0,2%	154,879	+ 155 %
2013	228,870 +10 %	41,604	- 73 %
2014	195,273 - 15 %	179,587	+ 332 %
2015	191,587 - 2 %	196,247	+ 9 %

Table 3

Lawyer's assistance in voluntary mediation				
	Inviting party to mediation legally NOT legally assisted		Present invited party legally NOT legally assisted	
	A	B	C	D
21.3.2011 / 31.12.2012	81%	19%	81%	19%
1.1 / 30.9.2013	72%	28%	65%	34%
2014 Year	63%	37%	73%	27%
2015 Year	52%	48%	83%	17%
2016 Year	n.a.	n.a.	84%	16%

Untill September 19th, 2013 lawyer's assistance in mediation was not compulsory.

Table 4

Categories of mediation (resolved cases)				
	Mandatory by law	Voluntary	Delegated by judge	Compulsory by contract
	A	B	C	D
21.3 / 31.12.2011	78%	20%	2%	0.5%
2012	85%	12%	3%	0.3%
2013	56%	42%	2%	1.5%
2014	80%	12%	8%	0.6%
2015	82%	8%	10%	0.4%
2016	80%	9%	11%	0.5%

Table 5

Outcome by type of referral / proceeding			
	Settled proceedings	Success rate	Success rate
	according to type of mediation (resolved cases)	when parties go further [2]	when parties do NOT go further [3]
	A	B	C
21.03.2011 / 31.12.2012			
Mandatory by law	81%	43%	[1]
Voluntary	16%	62%	[1]
Ordered by judge	3%	29%	[1]
2013			
Mandatory by law	56%	30%	[1]
Voluntary	42%	64%	[1]
Ordered by judge	2%	22%	[1]
2014			
Mandatory by law	80%	45%	n.a.
Voluntary	12%	67%	n.a.
Ordered by judge	8%	33%	n.a.
2015			
Mandatory by law	82%	43%	21%
Voluntary	8%	62%	41%
Ordered by judge	10%	31%	14%
2016			
Mandatory by law	80%	44%	23%
Voluntary	9%	61%	39%
Ordered by judge	11%	32%	15%
[1] In 2011, 2012 and until September 19, 2013, the first information meeting was not requested.			
[2] Success rate when parties go further than the information meeting.			
[3] Success rate when parties do NOT go further the first information meeting.			

Table 6

Mediation proceedings according to the type of mediation bodies				
	Mediation bodies	Settled proceedings	Success rate when parties go further [2]	Success rate when parties do NOT go further [3]
	A	B	C	D
21.3.2011 / 31.12.2012				
Chambers of Commerce	87	16%	49% °	[1]
Private organizations	686	56%	46% °	[1]
Professional not lawyers	80	0.6%	36% °	[1]
Bar associations	115	27%	34% °	[1]
	968	100%	44% °	[1]
2013				
Chambers of Commerce	87	16%	40% °	[1]
Private organizations	699	54%	49% °	[1]
Professional not lawyers	85	1%	47% °	[1]
Bar associations	115	29%	30% °	[1]
	986	100%	42% °	[1]
2014				
Chambers of Commerce	87	12%	54%	23%
Private organizations	644	54%	51%	27%
Professional not lawyers	92	1%	62%	38%
Bar associations	115	33	38%	21%
	938	100%	47%	24%
2015				
Chambers of Commerce	88	11%	48%	22%
Private organizations	611	53%	47%	26%
Professional not lawyers	88	1%	47%	33%
Bar associations	107	33%	37%	19%
	894	100%	43%	23%
2016				
Chambers of Commerce	87	11%	47%	23%
Private organizations	516	52%	48%	27%
Professional not lawyers	70	1%	51%	35%
Bar associations	105	36%	37%	21%
	778	100%	44%	24%
° Success rate (number of agreements / total defined proceedings) when the invited party is present				
[1] In 2011, 2012 and until September 19, 2013 the first information meeting was not requested.				
[2] Success rates when parties go further the first information meeting.				
[3] Success rate when parties do NOT go further the first information meeting.				

Table 7

Value of mediation disputes (euros)		
	Average ¹⁹	Median ²⁰
2012	n.a.	n.a.
2013	156.464	10.412
2014	110.556	20.000
2015	137.862	19.929
2016	139.544	17.000

Table 8

Length of proceedings (days)		
	Civil cases in Courts	Mediation proceedings cases when agreement is reached
2012	n.a.	65
2013	844	82
2014	984	83
2015	921	103
2016	882	115

¹⁹ If n numbers are given, the average is the sum of the numbers divided by n .

²⁰ The median is the middle number of the group when they are ranked in order.

Table 9

Incoming mediation proceedings by subject - 2016					
	Incoming proceedings	The invited party present	Agreement success rate when parties go further	Agreement overall success rate	Value median
	%	%	%	%	euro
	A	B	C	B x C = D	E
Bank contracts	20	46	7	3	40.000
Property	14	55	36	20	10.000
Other proceedings (non mandatory mediat)	12	43	36	16	11.640
Condominium	12	53	26	14	5.000
Lease	12	52	29	15	7.549
Medical malpractice	7	38	10	4	37.500
Insurance contracts	6	15	15	2	9.380
Partition	5	59	29	17	70.000
Will and inheritance	4	62	27	17	50.000
Financial contracts	3	40	8	3	19.684
Gratuitous loans	1	46	32	15	7.500
Business rents	1	53	32	17	25.954
Libel	1	38	16	6	37.500
Family agreements	0,2	54	21	11	24.000

Statistics based on data by Italian Ministry of Justice

https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx

MAIN ADR PROCEEDINGS IN ITALY

		People involved other than parties	Object	Duration	Enforceable
MEDIATION Independent of court	Voluntary	Mediator	Alienable rights, NO labour	No limits	No
	Administered voluntary	Mediator (mediation body)	Alienable rights, NO labour	3 months	Yes President of the Court (1)
	Mandatory (pre- trial)	Mediator lawyers (mediation body)	Property, partition, inheritance, lease, gratuitous loans, business rents, insurance banking & financial contracts, etc.	3 months	Yes Lawyers
	Delegated	Judge, mediator, lawyers (mediation body)	All alienable rights, NO labour	3 months	Yes Lawyers
NON BINDING ARBITRATION	Court annexed	Judge lawyers	All alienable rights, NO labour	Specified by judge	Yes Judge
NON BINDING ARBITRATION and DELEGATED MEDIATION	Court annexed	Judge, mediator, lawyers (mediation body)	All alienable rights, NO labour	Specified by judge	Yes Lawyers/ judge
ASSISTED NEGOTIATION	Voluntary	Lawyers	All alienable rights, NO labour	No limits	No
	Mandatory (pre- trial)	Lawyers	Compensation for damages due to car/boat accident; payments up to 50,000 euro	3 months	Yes lawyers
ARBITRATION Out of court Court annexed	Voluntary	Arbitrator, lawyers	All alienable rights	8 months	Yes
	Voluntary	Arbitrator, lawyer	All alienable right	8 months	Yes
	Transfer in arbitration in the cases pending before the Court upon the parties' agreement				
PEER NEGOTIATION	Voluntary	Companies, Consumers' associations	Complaint procedures for service users	No limits	No

..(1) Under request by the parties

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