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Mediation in Italy, July 2014; new rules beeing approved

According to Cepej (European Commission for the Efficiency of Justice) figures, related to the 47 Council of Europe member States, Italy has

- high number of litigation cases

Number of 1st instance incoming and resolved civil cases per 100.00 inhabitants in 2010

Italy	3.958	4.676
Average	2.738	2.663

- long lasting litigation cases

Disposition time of litigious cases in 1st instance courts, in days in 2010

Italy	493
Average	287

- a huge number of lawyers

Number of lawyers absolute number per 100.000 inhabitants per professional judge in 2010

Italy	211.962	350	32
Average	///	128	10

According to the Italian Ministry of Justice there was a tremendous number of pending civil litigation cases in the overall judicial system: 5.532.216 in 2010.

To cope with these problems Legislative Decree 28/2010 and Ministry Decree 180/2010 ruled compulsory mediation in many civil matters, in force since March 21st, 2011; mediation as a pre-condition to assessing courts. Furious opposition by most lawyers (too many and with decreasing revenues). Inadequate ADR training course: only 50 hour lectures, including final exams (99,99999...% successfull candidates). Consequences: low quality standards¹, a lot of mediation proceedings (60.810 in 2011, 154.879 in 2012), very few disputes settled with an agreement (10.338 in 2011, 16.867 in 2012).

Constitutional Court stated since Dicembre 12nd, 2012, the incostitutionality of compulsory mediaton rule, because of overdelegation (a lack of legislative power delegation by Parliament to Govern), not because of the breach of people's right to defence. Mediation proceedings dropped down but voluntary mediation survived, with a rate of success much higher than the compulsory one.

¹ Matteucci Giovanni, "Mediazione avanti tutta ma ... la formazione?", January 30, 2012

<http://www.altalex.com/index.php?idnot=16703>

Riccardi Carlo, "Formare alla mediazione", July 21, 2014, <http://blogconciliazione.com/2014/06/formare-alla-mediazione/>

Civil (not family) and commercial mediation in Italy

	Proceedings	All parties present	Success rate all parties present	Agreement	
2011 2° quar.	18.138	26%	59%	15%	2.811
3° “	15.670	30%	51%	15%	2.397
4° “	27.002	36%	49%	18%	4.860
2° / 4° quar.	60.810	31%	54%	17%	10.338
2012 1° quar.	30.880	36%	44%	16%	4.848
2° “	51.634	26%	43%	11%	5.783
3° “	45.040	22%	40%	9%	3.963
4° “	27.325	21%	38%	8%	2.273
Year	154.879	26%	42%	11%	16.867
2013 1° quar.	4.785	29%	46%	12%	638
2° “	4.485	33%	50%	17%	798
3° “	6.369	26%	52%	14%	921
4° “	25.965	34%	42%	12%	3.228
Year	41.604	30%	47%	14%	5.586

Types of proceedings

	Compulsory by law	Voluntary	Mandatory by judge	Compulsory by contract
21.3.2011 / 31.3.2012	77%	20%	2,5%	0,5%
2013 year	56%	42%	1,9%	1,4%

Outcome according to types of proceedings

	Settled proceedings according to type of mediation	Success rate all parties present	Agreement rate
21.3.2011 / 31.3.2012			
Compulsory	78%	45%	$78 \times 0,45 = 35\%$
Voluntary	18%	65%	$18 \times 0,12 = 12\%$
Mandatory	3%	33%	$3 \times 0,33 = 1\%$
2013 year			
Compulsory	56%	30%	$56 \times 0,30 = 17\%$
Voluntary	42%	64%	$42 \times 0,64 = 27\%$
Mandatory	2%	22%	$2 \times 0,22 = 0,5\%$

Statistics based on data by Italian Ministry of Justice

<http://webstat.giustizia.it/AreaPubblica/Analisi%20e%20ricerche/Forms/Mediazione.aspx>

The most efficient mediation bodies have always been those run by private entrepreneurs and Chambers of Commerce; the less efficient those run by lawyers.

Mandatory mediations by judges were very few, about 2%. But the situation is improving, though very slowly.

Under the pressure from the European Union, the “to Do” Law decree 69/2013 reintroduced mediation as a precondition to assessing courts, with some amendments to the previous regulations. The new rules came into force in September 20th, 2013, with the following features:

- secrecy of the proceedings;
- compulsory proceedings in the following matters (almost the same as in the 2011 – 2012 period): condominium disputes, property rights, division of property, hereditary successions, family-owned business inheritance agreements, landlord versus tenant disputes, loans, leasing of companies, sanitary (wider than medical) malpractice, libel and slander, insurance banking and financial contracts;
- accredited mediation bodies chosen within the territorial jurisdiction of the competent judge;
- if parties do not reach an agreement, the mediator can make a written proposal (asked by parties or on his own initiative); within seven days time parties are free to accept or decline the proposal, but in the subsequent trial the judge will exclude the refund of costs borne by the winning party who had declined it;
- the settlement agreement reached before an accredited mediation body is enforceable either when undersigned by the party-appointed lawyers or by approval of the court;

and, in order to accomplish to the extremely heavy pressure by lawyers

- compulsory lawyer’s assistance to the parties;
- first “information” meeting free of charge (except for a 48,00 euro fee); the invited party can dodge the proceeding by not attending the mediation meeting with the plaintiff and the mediator.

Practical results, i.e. agreements, very few due to poor knowledge of the subject and to the lawyers’ behaviour (to the limit of boycott)

With some interesting peculiarities:

- very high positive performance for voluntary mediation;
- possibility for judges to order litigants to try mediation in ALL subjects related to disposable civil rights (mandatory mediation) (ex art. 5 D.Lgs. 28/2010);
- possibility for judges (since June 2013) to make a proposal of solution (ex art. 185 bis civil procedure code) in ALL subjects related to disposable civil rights, based on equity, that the parties may accept or not (not binding arbitration);
- possibility for judges to combine these two options: making the proposal of solution; in case it is not accepted, ordering the mandatory mediation (arbitration – then – mediation).

From June 2013 until June 2014 only about ten judges have used these opportunities in about fifty cases². Very few. But with very interesting results: in most cases lawyers (though “*ob torto collo*”) joined the mediation procedure and litigants reached an agreement.

And the Italian Ministry of Justice is considering these positive results.

² If interested, have a look at www.adrmaremma.it, Italian section, News.

Pending civil litigations are still more than 5 millions. The Prime Minister on June 30, 2014 announced 12 goals to be reached in the reform of Justice. Two days later the Ministry of Justice started a public confrontation on the new rules, to be adopted in September 2014³.

As far as mediation is concerned:

- assisted negotiation by lawyers: 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 children under age or anyway dependant), 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;
- equating judicial proposal to the judgment, for the purpose of assessing the productivity of the judge;
- compulsory judicial proposal in all pending court cases lasting for more than three years;
- transfer before the arbitrator the cases pending before the court, upon the parties' agreement.

Also, finally, "*focus on interest, not position*" :

- 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; 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.

What is predictable?

- Explosion of judicial proposals and (to a lower degree) mandatory mediation;
- greater caution in taking legal action carelessly;
- lawyers' attempt to extend -surreptitiously- the assisted negotiation also to the subject matter of mandatory mediation.

If this last point doesn't come true, Italy will be the European Country with the largest number of ADR methods (and, as already happens, procedures).

What it will also involve:

- satisfactory knowledge of mediation (and, now, collaborative law, which is NOT mediation);
- issue by the ministry of certificates of the expenses incurred for mandatory mediation, so as to benefit from the tax reduction provided by law.

³ http://www.giustizia.it/giustizia/it/mg_2_7.wp?jsessionid=8E68C407DD8FC1E142FA9EB4A5E6D754.ajpAL03
https://www.giustizia.it/giustizia/prot/it/mg_2_7_1.wp?previousPage=mg_2_7
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