Dr. Giovanni Matteucci October 18<sup>th</sup>, 2014

# ADR and the judiciary in Italy

In Italy every year there are more than 4 million new civil proceedings, more than 5 million pending civil proceedings, and almost 200,000 new civil mediations—but less than 25,000 agreements. Only 2% of the new mediation proceedings are delegated by a judge.

The presence of the judiciary in the current Italian ADR scene is extremely weak. This in spite of the remarkable results achieved by a single judge keen on mediation: no less than a 10% reduction in pending proceedings in one year and a half, and more than 50% agreements reached in non-binding arbitrations and/or delegated mediations.

The tool works, it is very efficient and yet underutilised. Why?

#### 1. The framework

According to Cepej<sup>1</sup> figures for **2010** and **2012**, compared to 46 and 44 other European countries respectively, Italy had:

- a lower than average proportion of the total public spending allocated to the whole justice system (value in %)  $^2$ 

Table 1

Average	1.9	2.2
Spain	1.0	0.9
Poland	2.9	3.2
Italy	1.5	1.5
Germany	1.6	1.5
France	1.1	1.9
Croatia	1.9	1.9

- a high number of litigation cases<sup>3</sup>

Table 2 No. of 1st instance incoming and resolved cases; civil cases per 100,00 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
Poland	2,146	2,038	2,769	2,451
Spain	4,219	3,950	3,828	3,814
Average	2,738	2,663	2,492	2,466

<sup>1</sup> Cepej, European Commission for the Efficiency of Justice, set up by the Committee of Ministers of the Council of Europe <u>http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport\_en.pdf</u> and http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/Rapport\_2014 en.pdf

<sup>2</sup> Cepej, figure 2.4 / 2.2.

<sup>3</sup> Cepej, figure 9.5 / 9.4.

- long-lasting litigation cases <sup>4</sup>

Table 3	Disposition time of litigious	civil cases in 1st instance courts, in days
Croatia	462	457
France	279	311
Germany	184	183
Italy	493	590
Poland	180	195
Spain	289	264
Average	287	246

# - a huge number of lawyers <sup>5</sup>

Table 4	Number of practicing lawyers (excluding legal advisers)					
	absolute	e number	per 10,000	) inhabitants	per professio	onal judge
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
Poland	29,469	44,082	77	114	3	4
Spain	125,208	131,337	272	285	27	25
Average	//	//	128	139	10	11

According to the Italian Ministry of Justice, there were a tremendous number of pending civil litigation cases in the overall judicial system: 5,532,216 in 2010 and 5,285,989 in 2012.

### 2. The introduction of mandatory mediation.

Legislative Decree 28/2010 and Ministerial Decree 180/2010, both enforced since March 20<sup>th,</sup> 2011, established compulsory mediation in many civil matters. Before turning to the court, the plaintiff was to undergo mediation proceedings in litigations relating to:

since March 20<sup>th</sup>, 2011

- ''diritti reali''	rights in rem		
- "divisione"	division of assets		
- "successioni ereditarie"	inheritance		
- " <i>patti di</i> 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			

<sup>&</sup>lt;sup>4</sup> Cepej, figure 9.12 / 9.9.

<sup>&</sup>lt;sup>5</sup> Cepej, table 12.1 / *12.1*.

o con altro mezzo di pubblicità"

civil liability for medical malpractice and defamation in the press and 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.

As an alternative to mediation *stricto sensu*, this law provided for the possibility (still in force) that the mediator makes a proposal at the request of the parties or *sua sponte*, even in the absence of a party—a real absurdity. Moreover, if one or both of the parties did not share the proposal, an agreement was not reached, and in subsequent proceedings the magistrate's decision was the same as the mediator's proposal, the party that had not accepted it (even if he wins the dispute) would face a significant increase in costs. According to this law, the mediator was (and this is still the case) not only the neutral third party that must help litigants reach an agreement—their agreement—but also a subject that could indicate a solution to the dispute. Furthermore, the mediation process was beginning to have connections with the trial.

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

Judges could **INVITE** litigants **TO** UNDERGO (delegated) **MEDIATION** in disputes over **ALL** alienable rights ("*diritti disponibili*").

Mandatory mediation was met with furious opposition by most lawyers (too many, and with decreasing incomes), who feared an *Alarming Drop in Revenues*. Moreover, the ADR training course proved inadequate: it consisted of only 50 hours of lectures, including the final exams (with a pass rate of 99,99999...%!). The consequences were unsurprising: low quality standards, a lot of mediation proceedings (60,810 in 2011, 154,879 in 2012), and very few disputes settled with an agreement (10,338 in 2011, 16,867 in 2012).

The judiciary has shown a "benign neglect" of mediation, regarding it as "the daughter of a lesser God". Out of all mediation proceedings, those delegated by judges were only 2 - 3%!

On March  $21^{st}$ , 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. 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 (see table 6, column C).

On December 12th, 2012, the Constitutional Court declared the unconstitutionality of compulsory mediation, due to overdelegation (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.

Under pressure from the European Union, the so called "To Do" Law decree 69/2013 reintroduced mediation as a mandatory first step before going to court, starting September  $20^{\text{th}}$ , 2013. But the heavy pressure exerted by lawyers on the members of Parliament (many of whom are lawyers as well) 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;

- 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!), where THE **PARTIES** –assisted by the lawyer- **CAN** "OPT-OUT" 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 often abstain from participating or 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. Therefore, despite the explosion of mediation proceedings, the parties reached an agreement in only 12 / 11 % of cases.

Moreover "To Do" Law decree declared all lawyers mediators *ope legis* and their representative body established a training program of only 15 (FIFTEEN) hours.

In addition, Law decree 69/2013 stated:

- 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 may accept or not (**NON-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).

Despite all this, delegated mediations still amount to 2% of the total number of proceedings.

#### **3** . Benign neglect by the judiciary

Mediation belongs to the Italian juridical culture <sup>6</sup>.

The Italian State was founded in 1861. The heading of the seven introductory articles of the first Civil Procedure Code (1865) was "Conciliation".

According to a law issued in the same year, police officers must first of all reconcile conflicts among private citizens, if required to do so (this normative principle is still in force).

In 1880, 70% of judicial decisions were issued by conciliators.

According to the Law 261/1892 the judge "*in order to reach a conciliation, may request a party to attend a private hearing*"; if he was not successful, he could postpone the attempt to a further meeting. In other words, in the field of judicial conciliation, the law provided for the possibility of separate meetings with only one party present (a caucus *ante litteram*).

In the early 1920s fascism came to power (1922–1943) and tried to create a totalitarian state: the management of controversies could not be entrusted to private citizens, only judges appointed by the State could manage disputes by delivering judgments.

The 1941 Civil Procedure Code, art. 183, provided for the possibility of conciliation managed by the judge in pretrial hearings; nevertheless, this has always been a mere 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, resumed shyly by the Italian legislation of the late nineteenth century, supported by the Italian doctrine of the early twentieth century, and rejected by the bankruptcy law passed by fascism in 1942<sup>7</sup>.

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.

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

http://www.ilfallimentarista.it/insolvenza\_negoziazione\_sguardo\_storico 21.2.2013.

<sup>&</sup>lt;sup>6</sup> Matteucci Giovanni, "Cenni storici sulla mediazione – Short history of mediation",

https://www.academia.edu/8642790/Cenni\_storici\_sulla\_mediazione - Short\_history\_of\_mediation 5.10.2014.

<sup>&</sup>lt;sup>1</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"

techniques and not on the basis of constitutional guarantees; preference for the mediator to be a lawyer (*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, Law 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>8</sup>. This rule disappeared as the decree was converted into law.

#### 4. First interesting results

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

- "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>9</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 above, Law decree 69/2013 established the possibility for judges to make a non-binding-arbitration decision and to order litigants to undergo mediation in all subjects related to alienable civil rights (delegated mediation).

From June 2013 to September 2014, a few relevant sentences indicating a growing interest in mediation on the part of the judiciary <sup>10</sup> were issued. These were very few but showed important 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 professionals who do not attend the first informative meeting, or

<sup>&</sup>lt;sup>8</sup> D.L. 22.12.2011. n. 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".

<sup>&</sup>lt;sup>9</sup> <u>http://www.mondoadr.it/cms/articoli/resoconto-del-convegno-il-ruolo-del-giudice-nella-mediazione.html</u>

<sup>&</sup>lt;sup>10</sup> Most of the judgments issued by Italian magistrates on the subject of mediation are available at <u>www.adrmaremma.it</u>, in the Italian section, under "News".

attend it (without the respective party) only to declare that they are not interested in proceeding with the mediation. Judges are now 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  $23^{rd}$ ,2013 to October  $10^{th}$ ,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-than-med*); in 58% of all cases the parties reached an agreement <sup>11</sup>.

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

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<sup>&</sup>lt;sup>11</sup> http://www.adrmaremma.it/news199.pdf

Table 5	Civil (not family	y) and commerci	al mediation	in Italy
Proceedings	Pending initial	Registered	Settled	Pending final
_	A	В	С	A+B-C = D
2011 2nd quarter	n.a.	18.138	n.a.	n.a.
3rd "	n.a.	15.670	n.a.	n.a.
4th "	n.a.	27.002	n.a.	n.a.
21.3 / 31.12	742	60.810	40.162	21.390
2012 1st quarter	21.390	30.880	19.131	33.139
2nd "	33.139	51.634	39.758	45.015
3rd "	45.015	45.040	n.d	n.d
4th "	n.d.	27.325	n.d.	23.638
Year	21.390	154.879	152.631	23.638
2013 1st quarter	23.638	4.785	9.711	18.712
2nd "	18.712	4.485	1.118	22.078
3rd "	22.078	6.369	3.572	24.875
4th "	24.875	25.965	9.618	41.222
Year	23.638	41.604	24.019	<u>41.222</u>
2014 1st quarter	49.342	58.389	33.349	74.383

	Registered	All parties	Success rate	0	eement
]	proceedings	present	all parties present	all parti	es present
	А	В	С	BxC=D	AxD=E
2011 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
21.3 / 31.12	60.810	31%	54%	17%	9.912
2012 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
Year	154.879	26%	42%	11%	16.727
2013 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
Year	41.604	31%	49%	15%	6.365
2014 1st quar.	58.389	40%	28%	11%	6.598

Table 7	Types of proceedings			
	Mandatory by law	Voluntary	Delegated by judge	Compulsory by contract
	А	В	С	D
2011 21.03 / 31.12	77%	20%	2%	1%
2012 Year	86%	11%	3%	0,03%
2013 1st quar.	53%	43%	4%	1%
2nd "	43%	54%	2%	1%
3rd "	25%	70%	1%	3%
4rd "	64%	39%	2%	1%
Year	55%	42%	1,9%	1,4%
<b>2014</b> 1st quar.	84%	13%	2%	0,8%

Table 8	Outcome according to type of proceeding			
ассог	Settled proceedings rding to type of mediation	Success rate all parties present	Agreement rate	
	А	В	AxB = C	
21.3.2011 / 31.3.2012				
Mandatory by law	78%	45%	35%	
Voluntary	18%	65%	12%	
Ordered by judge	3%	33%	1%	
Year 2013				
Mandatory by law	56%	30%	17%	
Voluntary	42%	64%	27%	
Ordered by judge	2%	22%	0,5%	
2014 1st quarter				
Mandatory by law	85%	22%	20%	
Voluntary	13%	62%	8%	
Ordered by judge	2%	14%	0,32%	

Table 9	Mediation proceedings according to type of mediation bodies			
	<b>Mediation</b> <b>Bodies</b> <sup>12</sup>	Settled proceedings	All parties present	Agreement all parties present
	А	В	С	D
21.3.2011 / 31.3.2012				
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%
	813	59.292	35%	48%
Year 2013				
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%
	986	24.019	32%	42%
2014 1st quarter				
Chamber of Commerce	86	4.040	40%	26%
Private	643	19.033	40%	33%
Professional (not lawyers)	) 86	453	27%	9%
Bar association	114	9.824	41%	21%
	924	33.349	40%	28%

Statistics based on data provided by Italian Ministry of Justice https://webstat.giustizia.it/\_layouts/15/start.aspx#/SitePages/Home.aspx

<sup>&</sup>lt;sup>12</sup> Mediation bodies at the end of the period.

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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 2007 and a trainer since 2011; he operates as a mediator at the Chamber of Commerce of Grosseto and at Conciliatore BancarioFinanziario, and as a trainer at the Bar of Rome, 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 and, since 2014, he is a European Project Consultant.

#### He has published

"La mediaconciliazione: una mimesi di legislazioni altrui o un recupero delle nostre tradizioni? -The mediation: a mimesis of the laws of others or a recovery of our traditions?", "Mediazonciliazione e banche -Mediation and banks", "Brevi note in tema di mediazione civile e commerciale - Short notes on the subject of civil and commercial mediation", "Per la mediazione un futuro fallimentare - To mediate a future bankruptcy ("Temi Romana - Roman Themes", four months Bar of Rome), year LVIII, no.1-3, January / December 2010;

"Mediation in bankruptcy: come mediare con le banche in situazioni di crisi - Mediation in bankruptcy: how to mediate with the banks in crisis situations" in the "Quaderno di Giurisprudenza - Notebook of Law" at the University eCampus, "Temi di mediazione, arbitrato e risoluzione alternative delle controversie (ADR) - Themes of mediation, arbitration and alternative dispute resolution (ADR)", Volume II, April 2011;

#### and on the web

www.mondoadr.it "Mediazione e insolvenza: il tuolo degli organismi di composizione della crisi - Mediation and insolvency, the role of the bodies of resolution of the crisis", "Quando la mediazione incontra l'ambiente - Environmental Mediation" and "Concordato preventivo in continuità e preconcordato; ma .. la negoziazione? - Pre-bankruptcy procedures but ... negotiation?"

<u>www.altalex.com</u> articles and **e.books** : "Mediazione bancaria e finanziaria - Banking and financial mediation", "Crisi da sovraindebitamento - Overindebtedness procedure" and "Gestione della crisi di impresa - Steering firm financial crisis"

www.eu.altalex.com "Mediation and over-indebtdeness in Italy"

www.ilfallimentarista.it "Insolvenza e negoziazione in italia: uno sguardo al pasato - Insolvency and negotiation in Italy: a view to the history"

http://piazzettamonte.creditmanagementbank.eu Unicredit bank (among others) "Come prevenire le sofferenze bancarie in italia - How preventing non performing loans in Italy";

<u>www.blogconciliazione.com</u> Milan Chamber of Commerce, "Conciliazione endoprocessuale e mediazione delegata: tenetele d'occhio - Inside trial and court-annexed mediation: look at them", "E non chiamatela mediazione – And do not call it mediation", "Mediazione civile in Italia al 31.12.2013: Eppur si muove! - Civil and commercial mediation in Italy at December 31<sup>st</sup>, 2013: still alive!" and "Un colpo al cerchio ed uno alla botte - Running with the hare and hunting with the hounds"

http://unaf.org/wp-content/uploads/ 2013/ 01/ 10\_12\_ponencias\_foro\_mundial\_mediacion\_Valencia\_2.pdf *"Mediaciòn y sobreendeudamiento en Italia"*, VIII Conferencia internacional Forum Mundial de Mediaciòn, Valencia, Espana 18 – 21 octubre 2012, Libro digital FMM 2012, Volumen II, pag.56

<u>www.redp.com.br</u> "Decreto del Fare e mediazione: avvocati mediatori ope legis" in Revista Eletronica de Direito Processual REDP, Volume XII, pag. 208; Periodico da Pòs-Graduacao Stricto Sensu em Direito Proessual da UERJ Universidade do Estato do Rio de Janeiro.

He created and manages the website <u>www.adrmaremma.it</u>, on which, under the Articles section, he has published "Mediazione e concordato preventivo - Mediation and pre-bankruptcy", "Crisi di liquidità e conciliazione - Liquidity crisis and mediation", "Tecniche di mediazione per prevenire i reati, l'esperienza della Questura di Grosseto - Techniques of mediation to prevent crime, the experience of police in Grosseto".

He has created instructional videos on mediation, www.youtube.com/adrmaremma .

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