

“Italy is doing it – should we be ?” Civil and commercial mediation in Italy ¹

Abstract

. Mediation is a voluntary proceeding; is mandatory mediation acceptable? Is it useful?
. *Alternative Dispute Resolution* is the most efficient way to manage conflicts and resolve disputes; why is it so underutilized? Why do lawyers fear an *Alarming Drop in Revenues*?
. The Italian experience: mandatory mediation approved, revoked, and reloaded; since September 2013, a ‘mitigated’ mandatory mediation system with an opt-out mechanism is in place. Does it work?

1. Italy is doing it - Should we be? 2. The overall situation 3. A bit of history 4. 2010: mandatory mediation approved 5. Lawyers’ strike, Constitutional Court decision, mandatory mediation revoked 6. 2013: mandatory mediation reloaded 7. “*Il diavolo fa le pentole ma non i coperchi*”, truth will out; the judiciary 8. New rules being approved

1 . Italy is doing it – should we be?

Mandatory Mediation in Italy – Reloaded: “*The ‘Italian mediation explosion’ attracted a lot of attention from the international mediation community. The mediation explosion came to a sudden halt in December 2012, when the Italian Constitutional Court ruled that the provisions had been unconstitutional. Just recently, on September 20, 2013, a new regulation came into effect, again opting for mandatory mediation, but with several important modifications*”; Rafal Morek, Kluwer Mediation Blog, October 9th, 2013 ². These words appeared at the beginning of October 2013 on a blog connected with a prestigious name in international publishing.

Some weeks later. **Italy is doing it - should we be?** : “*When mandatory mediation was first introduced in Italy in 2011, over 220,000 mediations were started. Of these almost 50% settled. Not bad for a country where it is estimated that 5.4 million disputes are currently pending before the Courts! It will be interesting to follow the progress made over the next 12 months and see what lessons we can learn and possibly bring to the UK*”; Gemma Bowen, LinkedIn ADR Professionals, October 23rd, 2013 ³.

Reading that English professionals were following the Italian experience on commercial mediation to “*learn and possibly bring it to the UK*” puzzled me. As an Italian, and as a commercial mediator, I was pleased. But the statement “*over 220,000 mediations were star-*

¹ Published in “*Contemporary tendencies in mediation*”, pages 205 – 228, Dykinson, April 2015, ISBN 978-84-9085-312-2, Universidad Carlos III de Madrid <http://e-archivo.uc3m.es/handle/10016/20429>

² http://kluwermediationblog.com/2013/10/09/mandatory-mediation-in-italy-reloaded/?goback=%2Egde_163292_member_5795889772836700160#%21

³ http://www.linkedin.com/groupAnswers?viewQuestionAndAnswers=&discussionID=5795889772836700160&gid=163292&commentID=5798906971604135936&trk=view_disc&fromEmail=&ut=3UhVhGKjXIEBY1

ted. Of these almost 50% settled” did not accord with the statistical figures issued by the Italian Ministry of Justice. Between the second quarter of 2011 and the fourth quarter of 2012 (roughly the period in which mediation was compulsory), 215,689 mediation proceedings were started in Italy; of these, 26,822 ended with an agreement. Therefore 12% were settled, not 50%. Moreover, while 15% of mediations were settled at the beginning of the period, the figure dropped to 8% at the end.

Why?

Last but not least, 215.689 mediation precedures is a very small number in terms of the 4.3 million court proceedings started, the 4.5 million ended and the 5.5 million pending (in 2012).

The European Parliament commissioned a study, *Rebooting the mediation directive*, published at the beginning of 2014, contributed to by 816 experts from all over the EU.

Among other results:

Table 1 *Estimated number of mediation per year*

More than 10 000	Germany, Italy, Netherlands, UK
between 5 000 and 10 000	Hungary, Poland
between 2 000 and 5 000	Belgium, France, Slovenia
between 500 and 2 000	Austria, Denmark, Ireland, Romania Slovakia, Spain
less than 500	Bulgaria, Croatia, Cyprus, Czech Rep., Estonia, Finland, Greece, Latvia, Lithuania, Luxembourg, Malta, Portugal Sweden

Table 2 *Top-Ranked, Most Effective Legislative Measures to Increase Mediation Use*
(by number of preferences expressed)

Make mediation mandatory in certain categories of cases	132
Require mandatory mediation information sessions before litigation	110
Provide incentives for parties who choose to mediate	97
Require counsel to inform parties of mediation as an alternative to litigation	72
Impose sanctions for parties’ refusals to attend mandatory mediation	54
Grant judges the power to order litigations to mediation	51

Moreover :

“... only a certain degree of compulsion to mediate (currently allowed but not required by the EU law) can generate a significant number of mediations. In fact, all of the other pro-mediation regulatory features mentioned in the study’s terms of reference, such as strong confidentiality protection, frequent invitations by judges to mediate and a solid mediator accreditation system, have not generated any major effect on the occurrence of mediations.

“... elements of mandatory mediation can have a positive effect on voluntary mediation as well. In Italy, for example, when mediation was not mandatory (until 2011), there were no more than 2 000 mediations per year. At the time mediation became mandatory (March 2011-October 2012), the number of voluntary mediations climbed to almost 45 000, out of over 220 000 proceedings as a whole. When mediation ceased to be mandatory (October 2012 – September 2013), along with that of mandatory mediations also the number of voluntary mediations fell to almost zero. Now that mediation is again a pre-requisite to litigation in certain

cases (since September 2013), both mandatory and voluntary mediations are being initiated at a rate of tens of thousands per month.

“ Italy, actually, features a ‘mitigated’ mandatory mediation system. Indeed, in certain categories of cases litigants are only required to sit down with a mediator for a preliminary meeting, at no cost, in lieu of having to go through, and pay for, a full-blown mediation. If any of the parties is not persuaded that mediation has good chances to succeed, they can ‘opt-out’ from the process during the preliminary meeting and go directly to court without negative consequences. Amongst other advantages, this model reduces to the minimum concerns about the litigants’ right of access to justice”⁴.

The Italian experience thus provides a very interesting case for study.

2 . The overall situation

According to Cepej⁵ figures for **2010**, compared to 47 other European Countries, Italy had:

- proportion of the public budget allocated to the whole justice system out of the total public expenditure less than the average (value in %) ⁶

Table 3

Croatia	1,9
France	1,1
Germany	1,6
<i>Italy</i>	<i>1,5</i>
Poland	2,9
Spain	1,0
Average	1,9

- high number of litigation cases ⁷

Table 4 *Number of 1st instance **incoming** and **resolved** ; civil cases per 100,00 inhabitants*

Croatia	3.323	3.384
France	2.758	2.713
Germany	1.935	1.941
<i>Italy</i>	<i>3.958</i>	<i>4.676</i>
Poland	2.146	2.038
Spain	4.219	3.950
Average	2.738	2.663

⁴ European Parliament, Directorate General for internal policies, Policy department citizens’ rights and constitutional affairs, Legal Affairs, “*Rebooting the mediation directive*” pag. 6 and 8, 2014

[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET\(2014\)493042_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf)

⁵ 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

⁶ Figure 2.4

⁷ Figure 9.5

- long lasting litigation cases ⁸

Table 5 *Disposition time of litigious cases in 1st instance courts, in days*

Croatia	462
France	279
Germany	184
<i>Italy</i>	493
Poland	180
Spain	289
Average	287

- **a huge number of lawyers** ⁹

Table 6 *Number of practising lawyers (without legal advisors)*

	<i>absolute number</i>	<i>per 100.000 inhabitants</i>	<i>per professional judge</i>
Croatia	4.133	94	2
France	51.758	80	7
Germany	155.679	190	8
<i>Italy</i>	<i>211.962</i>	<i>350</i>	<i>32</i>
Poland	29.469	77	3
Spain	125.208	272	27
Average	<i>///</i>	128	10

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.

All **these problems** did not arise in the last decades. Indeed, they **have existed for over a century**.

3 . A bit of history

Giovanni Giolitti, one of the most important figures in Italian political history, who was elected prime minister many times in the first decade of the twentieth century, once said: *“In Italy, a country of very low wages...; the overall tax burden has become so high as to sometimes constitute a real confiscation of property;...justice...is slow, very expensive, and does not provide sufficient guarantees ”* ¹⁰ - **1899**.

Giuseppe Prezzolini, a journalist and author, wrote in his book *Codice della Vita Italiana*: *“It is not true...that there is no justice in Italy. Instead, it is true that one should not ask*

⁸ Figure 9.12

⁹ Table 12.1

¹⁰ *“In Italia, paese di salari bassissimi ...; il complesso delle imposte è giunto a tale altezza da costituire talora una vera confisca della proprietà;...; la giustizia ..., è lenta, costosissima e senza sufficienti garanzie;...”* - **1899**

the judge for justice, but rather the influential deputy, minister, journalist, lawyer, etc. You can find it: the address is wrong"¹¹ – 1921.

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

“*It is important to keep in mind that the liberalization of the legal profession ... presents a serious danger, i.e. the possibility that the regime of beneficial competition among freelance professionals morphs into a desperate struggle for existence when, as the number of legal counsels becomes increasingly disproportionate to the number of lawsuits, normal professional work starts running short*” (page 35) – 1921¹².

In the more recent article “*Advocatus, et non latro? Testing the Supplier-Induced-Demand Hypothesis for Italian Courts of Justice*”, Fondazione Enrico Mattei, Nota di lavoro 2010, Paolo Buonanno (University of Bergamo) and Matteo Maria Gallizzi (University of Brescia) state the following: “*We explore the relationship between litigation rates and the number of lawyers in a typical supplier-induced demand (SID) frame. Drawing on an original panel dataset for the 169 Italian courts of justice between 2000 and 2007, we first document that the number of lawyers is positively correlated with different measures of litigation rate. Then, using an instrumental variables strategy, we find that a 10 percent increase in lawyers over population is associated with an increase between 1.6 to 6 percent in civil litigation rates. Thus, our empirical analysis supports the SID hypothesis for Italian lawyers: following an increase in their relative number, lawyers may exploit their informational advantage to induce clients to access courts even when litigation is unnecessary or ineffective.*” – 2010¹³.

Each of these analyses reached the same conclusion: too many lawyers, too many unnecessary and ineffective litigations.

Since 2008 / 2010 the situation has worsened in Italy:

¹¹ “... 18. Non è vero ... che in Italia, non esista giustizia. E' invece vero che non bisogna chiederla al giudice, bensì al deputato, al Ministro, al giornalista, all'avvocato influente ecc. La cosa si può trovare: l'indirizzo è sbagliato” - 1921

¹² “*In Italia, oggi, i professionisti legali sono in numero enormemente superiore ai bisogni sociali; questa elefantiasi patologica degli ordini forensi porta con sé, come naturale conseguenza, la disoccupazione e il disagio economico della gran maggioranza dei professionisti, e quindi il progressivo abbassamento intellettuale e morale della professione, del quale la pubblica opinione, pur senza intenderne esattamente le cause, si rende conto con tanta severità di giudizi*” (pag. 38).

“*Non bisogna dimenticare che il sistema della libera avvocatura ... presenta un grave pericolo, nella possibilità che il regime di benefica concorrenza tra i liberi professionisti si trasformi in una esasperata lotta per l'esistenza quando, aumentando il numero dei patrocinatori in misura sproporzionata al numero delle cause da patrocinare, il normale lavoro professionale venga a scarseggiare per tutti*” (pag. 35) – 1921.

¹³ A study by the Bank of Italy found similar results: Carmignani Amanda and Giacomelli Silvia, “*Too many lawyers? Litigation in Italian Civil Courts*”, Working Paper (Tema di discussione) n.745, February 2010, http://www.bancaditalia.it/pubblicazioni/econo/temidi/td10/td745_10/td_745_10/Sintesi_745.pdf.

- **the Italian litigation “market” has shrunk**; the number of new civil proceedings has decreased due to the economic crisis, starting in 2008, and the increase in court fees ¹⁴:

Table 7	Civil proceedings per legal year (numbers x 1,000) ¹⁵								
	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		
2010									
Registered	1.477			2.725			4.437		
Defined	1.748			2.742			4.706		
Pending 31.12	1.485			3.486			5.532		
2011									
Registered	1.509			2.678			4.409		
Defined	1.561			2.703			4.479		
Pending 31.12	1.554			3.452			5.566		
2012									
Registered	1.379			2.671			4.267		
Defined	1.512			2.761			4.500		
Pending 31.12	1.367			3.372			5.285		
2013									
Registered	738			1.499			2.326		
Defined	775			1.547			2.447		
Pending 30.06	1.320			3.328			5.159		
Variations %									
2012 / 2009	- 29	- 11	- 22	- 6	- 1	- 5	- 15	- 5	- 9

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

- **the number of lawyers has still increased** (x 100,000 inhabitants)

Table 8	1989	94
	2000	207
	2010	350
	2012/08	406 ¹⁶

- **lawyer revenues have decreased**: average taxable income for social security purposes amounting to EUR 40,333 in 2012; 13% decrease, 2012 / 2008 ¹⁷.

¹⁴ 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>.

¹⁵ Source: “Relazione del Ministero su amministrazione della giustizia”.

¹⁶ 2012/08 : lawyers 247.040, population 60.779.708 <http://www.albonazionaleavvocati.it/html/statistiche.html>

Therefore, most Italian lawyers read the acronym ADR not as Alternative Dispute Resolution but as “Alarming Drop in Revenues”.

4 . 2010: Mandatory mediation approved

According to the Italian Ministry of Justice, in 2010 there were a tremendous number of pending civil litigation cases in the overall judicial system: 5.532.216. **Mandatory mediation came into force.**

Legislative Decree 28/2010 and Ministerial Decree 180/2010, both enforced since March 21st, 2011, established compulsory mediation in many civil matters; mediation became a mandatory first step before going to court. Mandatory mediation was met with furious opposition by most lawyers. 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 ... % !!!).

Training can thus be seen as the Achilles heel of Italian mediation proceedings¹⁸.

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);
- 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;
- refresh 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;

¹⁷ Federica Micardi, “*Dai notai agli ingeneri redditi in forte calo*”, Il Sole 24 Ore 11.3.2014, pag. 22
<http://www.banchedati.ilsole24ore.com/EstrazioneDoc.do?product=BIG&doctype=HTML&idoc=SS20140311022BAA>

¹⁸ Matteucci Giovanni, “*Mediazione avanti tutta ma ... la formazione?*”, 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/>

- give lectures on ADR to professional associations, public bodies, Italian or foreign public universities;
- refresh 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 21st, 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 10, 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**.

Legislative Decree 28/2010 and Ministry Decree 180/ 2010 regulated mediation.

According to the Italian law, mediation is the procedure, conciliation the result (the agreement). It can only be used for disputes over alienable rights ("*diritti disponibili*").

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 mediator may make a written proposal (even if the parties do not require it and even in the absence of a party). 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.

Proceedings must remain secret.

The final agreement is enforceable if it does not violate mandatory regulations or 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.

Mediation can also be requested by the judge (delegated mediation) in disputes over alienable rights (“*diritti disponibili*”). But the judiciary has shown a “*benign neglect*” of mediation, which is regarded as “*the daughter of a lesser God*”.

Legislative Decree 28/2010 also introduced **mandatory** (by law) administered mediation for a large range of disputes. The plaintiff, before turning to the court, was to undergo mediation proceedings in litigations relating to:

since March 20th, 2011

- “*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 and other media
- “*contratti assicurativi, bancari e finanziari*”
insurance, banking, and financial contracts

since March 20th, 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.

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.

Legislative Decree 28/2010 also recognized the existence of voluntary negotiations 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)¹⁹.

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

¹⁹ In the Italian banking and financial sector there are at least five different types of ADR.

expectation of a “*mediation explosion*”: due to the economic crisis, many professionals, mainly lawyers, rushed to attend courses on mediation (for a duration of 50 hours, roughly 4 week-ends). As a consequence, there were about 1,000 “*Organismi di medizione*” (mediation bodies) and -while no one knows the exact number – approximately 40,000 mediators (mainly lawyers). There were more mediators (mainly lawyers) than mediations.

Table 9 Civil (not family) and commercial mediation in Italy

Proceedings	Pending initial	Registered	Settled	Pending final
	A	B	C	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	41.222
2014 1st quarter	<u>49.342</u>	58.389	33.349	74.383

Table 10	Registered proceedings	All parties present	Success rate all parties present	Agreement all parties present	
	A	B	C	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

<u>Table 11</u> ²⁰	Proceedings defined	All parties present	Success rate all parties present	Agreement all parties present	
	A	B	C	BxC=D	AxD=E
2011 21.3/31.12	40.162	31%	53%	16%	6.586
2012 1st quar.	19.138	36%	44%	16%	3.004
2nd “	39.758	26%	43%	11%	4.453
3rd “	n.a.	22%	40%	9%	==
4th “	n.a.	21%	3%	8%	==
Year	152.631	26%	41%	11%	16.484
2013 1st quar.	9.711	31%	43%	13%	1.311
2nd “	1.118	34%	62%	21%	236
3rd “	3.572	23%	58%	14%	486
4th “	9.618	36%	32%	12%	1.135
Year	24.019	31%	49%	15%	3.675
2014 1st quar.	33.349	40%	28%	11%	6.936

Table 12**Types of proceedings**

	Mandatory by law	Voluntary	Delegated by judge	Compulsory by contract
	A	B	C	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%
2014 1st quar.	84%	13%	2%	0,8%

Statistics based on data by Italian Ministry of Justice
<https://webstat.giustizia.it/layouts/15/start.aspx#/SitePages/Home.aspx>

²⁰ Table 7 and tabel 8 differ in the content of the first column (proceeding registered / defined); contents of columns B and C are identical. It's difficult that the mediations, although very fast, end in the same quarter, in which they are started. Therefore two different tables: the analysis of the same phenomenon, taking account of the time lag.

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

Even if most mediators were lawyers, Italy's national lawyers union (*Organismo Unitario dell'Avvocatura Italiana*) called for a national strike²¹. Most lawyers feared "Alarming **Drops in Revenues**"; many of them rightly pointed 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 28/2010 were made, needless to say, by lawyers themselves. 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.

Table 13

	Outcome according to type of proceeding		
	Settled proceedings according to type of mediation	Success rate all parties present	Agreement rate
	A	B	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%

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

²¹ " *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), lawyers are being asked to participate in a strike from March 16-22, and a public protest demonstration on March 16th. The strike is aimed at a new law commencing March 21st, requiring mandatory mediation in certain cases. Lawyers are being asked to attend the protest and to cease work on all cases during that period.

" Interestingly, the timing of the strike blankets a national holiday (March 17-18) and a weekend (March 19-20), 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 19th, 2011

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

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 decree 69/2013, reintroduced mediation as a mandatory first step before going to court, starting September 20th, 2013. The most efficient mediation bodies have always been those 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 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;
- 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 “op-out” from the process ²².

²² “*These elements, which were not part of the June 21st, 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 22nd, 2013, <http://www.mondoadr.it/cms/articoli/mandatory-mediation-italy-parliamentary-rules.html>

With regards to this issue, Calamandrei's words still ring true a century later: “... *these two hundred lawyers who, for fifty years, have formed the unchangeable basis of our Chamber, whenever some bolder minister confronted them with the issue of judicial reform, allowed themselves to be guided by a parochial or class politics, rather than by a national politics; and so it seems, though it is sad to admit it, that the large number of lawyers sitting in Parliament has been so far the most formidable obstacle against a radical reform of our legal system and our procedural law*” (“... *questi duecento avvocati che da cinquanta anni costituiscono la base immutabile della nostra Camera, tutte le volte che da qualche ministro più audace sono stati messi dinanzi ai problemi della riforma giudiziaria, si sono lasciati guidare anziché da una politica nazionale, da una politica campanilistica o addirittura da una politica di classe: sicché sembra, è triste doverlo confessare, che il gran numero di avvocati sedenti in Parlamento sia stato fin’ora il più formidabile ostacolo contro una riforma radicale del*”

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 practical result consists of 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 (see Table 10, column D). A huge hustle and bustle of paper work and very poor results, especially when compared to the more than 5 million pending civil litigations.

Furthermore, the Law 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 of mediation procedures.

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.

Table 14

Mediation proceedings according to type of mediation bodies

	Mediation Bodies ²³	Settled proceedings	All parties present	Agreement all parties present
	A	B	C	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%

nostro ordinamento giudiziario e del nostro diritto processuale” - Calamandrei Piero, “*Troppi avvocati (Too many lawyers)*”, Ed. La Voce, page 86, **1921**.

²³ Mediation bodies at the end of the period.

Table 15

	Legal assistance			
	Inviting party to mediation		Present invited party	
	legally assisted	NOT legally assisted	legally assisted	NOT legally assisted
	A	B	C	D
21.3.2011 / 31.12.2012	81%	19%	81%	19%
2011 Year	84%	16%	79%	21%
1.1 / 30.9.2013	72%	28%	65%	34%
<i>in the voluntary mediation *</i>				
2014 1° quarter	35%	65%	26%	74%

* Untill September 19th, 2013 legal assistance in mediation was not compulsory.

Statistics based on data by Italian Ministry of Justice
<https://webstat.giustizia.it/layouts/15/start.aspx#/SitePages/Home.aspx>

7. “*Il diavolo fa le pentole ma non i coperchi*”, truth will out – The judiciary.

One of the most interesting phenomena in the context of mediation in Italy, since the end of 2013, is the role of the judiciary.

As already mentioned, according to Legislative Decree 28/2010 mediation could also start at the **invitation** of the judge. But very few judges made use of this opportunity (see Table 12, column C).

Dr. Massimo Moriconi acted as a pioneer and, in the 2012 – 2013 period, achieved a reduction of at least 10% of the disputes entrusted to him²⁴ by using this strategy.

Moreover, Law decree 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 may accept or not (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 cases²⁵. Very few. But 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*”.

“*Il diavolo fa le pentole ma non i coperchi*”, truth will out!

²⁴ <http://www.mondoadr.it/cms/articoli/resoconto-del-convegno-il-ruolo-del-giudice-nella-mediazione.html>

²⁵ For further information see www.adrmaremma.it, Italian section, News.

Since September 2013, the above cited Dr. Moriconi has used the tactic of “arbitration-then-mediation” and in almost 50% of cases the parties have reached an agreement ²⁶ .

8 . New rules beeing approved

In August 2014, pending civil litigations in Italy are still more then 5millions. 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 on internet a public confrontation on the new rules, to be adopted in Sempthember 2014 ²⁷ .

As far as mediation is concerned:

- **transfer before the arbitrator the cases pending before the court, upon the parties’ agreement ;**
- **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 assesment in court ²⁸ .
- **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.**

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) delegated mediation by judges;
- greater caution in taking legal action carelessly;
- lawyers’ attempt to extend -surreptitiously- the assisted negotiation also to the subject matter of mandatory mediation.

²⁶ “Il Tribunale di Roma raggiunge il 58% di accordi a seguito della proposta del giudice e della mediazione demandata”, assimo Moriconi, 14.9.2014
<http://www.mondoadr.it/cms/articoli/il-tribunale-di-roma-raggiunge-il-58-di-accordi-seguito-della-proposta-del-giudice-della-mediazione-demdnata.html> .

²⁷ 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?previsiousPage=mg_2_7
https://www.giustizia.it/giustizia/prot/it/mg_2_7_2.wp?previsiousPage=mg_2_7

²⁸ Decreto legge (Law Decree) 132, September 12nd, 2014 art. 1 and art.2.

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) **with proper training**;
- issue by the ministry of certificates of the expenses incurred for mandatory mediation, so as to benefit from the tax reduction provided by law.

Giovanni Matteucci

P.S. – Needless to say: mandatory mediation in Italy is no “*mediation*” at all ! ²⁹

²⁹ Matteucci Giovanni, “*E non chiamatela mediazione! – And do not call it mediation*” Chamber of Commerce of Milan, 11.12.2013 <http://blogconciliazione.com/2013/12/e-non-chiamatela-mediazione-anche-perche-ha-una-funzione-paragiurisdizionale/>

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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 received his training in Online Dispute Resolution from 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" on "Temi Romana - Roman Themes" (four months of the 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;

"La comunicazione per gli operatori nell'emergenza- The emergency operators' communication" in "La protezione civile italiana - The Italian Civil Protection", January 2011;

and on the web

www.mondoadr.it "Mediazione e insolvenza: il ruolo 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?"

www.altalex.com 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" ;

www.blogconciliazione.com 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: Eppure si muove! - Civil and commercial mediation in Italy at December 31st, 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_forum_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

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

He created and manages the website www.adrmaremma.it , 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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