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論　　説

Successful Heresies, Contested Orthodoxies: Comparative Reflections on Recent Developments of ADR in Italy

Giorgio F. COLOMBO*

1. Introduction: a civil litigation system under constant stress

One of the biggest challenges any researcher interested in Italian law will face is keeping up with the pace of legal reforms in Italy. It is customary for any and every Italian government to engage in a series of sweeping legislation changes, most of them with the promise (of course) to be a *panacea* and definitively solve all the problems in a given field of law. This makes legal scholars' work a nightmare, and, considering the average waiting time to appear in reputed publications outlets, most papers end up being historical studies rather than critical analyses of in-force legislation.

Considering the dire status of civil justice,[1] it is unsurprising that legislative activity (both from the government and the parliament) often focuses on dispute resolution. Statistics from the World Bank (the famous - or notorious - "2019 Doing Business" ranking[2]) put Italy at a discomforting 111th position (one step

* Professor of Law, Nagoya University Graduate School of Law. *Status Juris*: July 2019.
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1） For a comprehensive overview of the Italian Civil Justice system, see Marco De Cristofaro and Nicolò Trocker, *Civil Justice in Italy* (Jigakusha 2010).

2） http://www.doingbusiness.org/en/data/exploreeconomies/italy#DB_ec.
For a criticism of the use of such rankings for research purposes, see Remo Caponi, 'The Performance of the Italian Civil Justice System: An Empirical Assessment' (2016) 2 The

above Algeria). The breakdown of single parameters is as follows: enforcing a commercial contract in the country normally takes 1120 days[3] (compared to an average of 582.4 days in other OECD countries), and the procedure costs 23.1% of the amount in dispute. This pathological length often results in Italy being sanctioned by the European Courts of Human Rights for violations of the European Convention of Human Rights, Art. 6 (Right to fair trial[4]): many judgments order the Italian Ministry of Justice to pay damages to whoever had to wait too long to get a judgement. In 2001,to fix (or, at least, regulate) the situation, a specific law was enacted, the Law 24 March 2001, n. 89, commonly known as the "Pinto Act",[5] which sets the criteria under which a litigation is considered too long and the State has to pay compensation to the party involved. The law considers a "pathologically" slow length of time to be more than three years in the first instance, 2 years in appeals, and 1 year before the Court of Cassation. According to the figures provided by the *Camera dei Deputati* (House of Representatives[6]), at the end of 2016, 689,665 procedures fell under this definition (and therefore potentially exposed Italy to pay compensation to the parties).

Notwithstanding this grotesque length, the outcome of the process is considered to be fairly good, with a "quality of the judicial process index" of 13 out of 18, above the OECD average of 11.5.[7] Moreover, in a country where (perceived)

Italian Law Journal 15, 18.

3） It should be noted, however, that there is a huge regional variation inside Italy, with the best performing court (Torino) taking 855 days, compared to the worst performance of 2,022 days (Bari). http://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts/italy.

4） "The Court has repeatedly stressed the importance of administering justice without delays which might jeopardise its effectiveness and credibility (Scordino v.Italy (no.1) [GC], § 224). Where the Court finds that in a particular state, there is a practice incompatible with the Convention resulting from an accumulation of breaches of the "reasonable time" requirement, and this constitutes an "aggravating circumstance of the violation of Article 6 § 1" (Source: Council of Europe, 'Guide on Article 6 of the European Convention of Human Rights - Right to a Fair Trial (Civil Limb)' (2018) 73.

5） The official denomination is: "Previsione di equa riparazione in caso di violazione del termine ragionevole del processo".

6） Camera dei Deputati - Servizio Studi, 'Efficienza del processo civile' (22 March 2018).

7） For a comparative reference, Japan has a score of 7.5, mainly because of its poor automation of the court system. See http://www.doingbusiness.org/en/data/exploreeconomies/japan#DB_ec.

structural corruption[8] is a major issue, the judicial system is seen as (relatively) healthy, and while cases of corrupt politicians are a daily issue, cases of corrupt judges or prosecutors are very rare.

Why is the Italian judicial system, with is fairly good quality and reasonably honest magistrates, so pathologically slow? One of the causes is, of course, the scarcity of professional judges: according to the European commission for the evaluation of justice (CEPEJ[9]), in Italy there are 10.6 professional judges (compared to an EU average of 18), and 35 non-judge staff (EU average: 59.3) per 100,000 people; and while clearance of new cases had become faster,[10] the judicial system is overburdened with pending cases - a staggering figure of 3,460,764.[11] This is, in the prevailing opinion, also due to the fact that the many lawyers operating in the country (312,663 as of January 2017[12]) tend to bring to the court disputes which could (or should) have been solved amicably[13] : as an old Latin saying goes, *dum pendet, rendet* (if [a dispute] is pending, it makes you earn).[14]

2. The Directive 2008/52/EC and its adoption in Italy

Given this background - which was equally true in 2008 - it is hence natural that, when the EU decided to adopt a comprehensive Directive on ADR, (the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, hereinafter

8） In the Transparency International "Corruption Index 2018", Italy has a score of 52/100, one of the lowest in the group of countries defined as "full democracy". A score of 49/100 would make the country fall into the category of "flawed democracy". See https://www.transparency.org/cpi2018.

9） https://www.coe.int/en/web/cepej

10） Also, according to CEPEJ, in 2016 Italy had a clearance rate of 113.2%: for every 2.57 new cases, 2.91 were solved.

11） Ministero della Giustizia, 'Sintesi della Relazione del Ministro sull'amministrazione della giustizia per l'anno 2019' (2019), figure of 31 December 2018.

12） https://www.albonazionaleavvocati.it/html/statistiche.html

13） Caponi (n 2) 25-26.

14） Elisabetta Silvestri, 'Italy: Civil Procedure in Crisis' in CH (Remco) van Rhee and Fu Yulin (eds), *Civil Litigation in China and Europe*, vol. 31 (Ius Gentium: Comparative Perspectives on Law and Justice, Springer Netherlands, 2014).

referred to also as "Mediation Directive"[15]) Italy seized the chance to heavily intervene on the overall dispute resolution system. However, it did that in a very "heretical" way, as it will be described below.

The Directive, in fact, was fairly (but not completely) close to ADR "orthodoxy": the theory of Alternative Dispute Resolution is defined with this term, as created by the so-called "School of Harvard".[16] This theory encompasses several principles, among which is that ADR should aim to reach a "win-win" solution, by which each party involved in the dispute is able to walk away from the procedure with a reasonable degree of satisfaction; in order to achieve that result, the mediator (or neutral, or conciliator) should employ several techniques including a certain degree of creativity. For example, rather than focusing on the purely financial aspects of the dispute, they should take into account other aspects (such as the desire to receive an apology or the need to have their reasons heard); the whole procedure should be based on voluntariness, *i.e.* parties should not only take part in the procedure only if willing to do so, but they should also accept the result of the whole process as it would be *good* for them, not because of some compulsion.[17] Moreover, the procedure should be as light as possible, *e.g.* lawyers should be involved only if parties feel the need to be represented, but their presence should not be imposed.

Italy, however, took a very "heretical" approach in the implementation of the Mediation Directive from the very beginning. The Italian legislator's priority, it was clear, was to use mediation to keep as many cases as possible out of the judicial system and therefore stretched the boundaries of the EU-proposed framework as far as possible to achieve this purpose.[18] One of the most controversial aspects of Legislative Decree 28 of 10 March 2010 (hereinafter

15）I summarized the process leading to the Mediation Directive in Giorgio Fabio Colombo, 'Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems' (2012) 29 Ritsumeikan Law Review 71.

16）Roger Fisher and others, *Getting to yes: negotiating an agreement without giving in* (Updated and rev.3. ed, Random House Business Books 2012).

17）This aspect was one of the major departures the Mediation Directive took from ADR orthodoxy. The Directive mentions the opportunity to make settlement agreements enforceable both in recitals 20-22 and in Art. 6.

18）Tomaso Galletto and Richard L Mattiaccio, 'Mediation in Italy: A Bridge Too Far?' (2011) 66 Dispute Resolution Journal 78.

referred to also as "D.Lgs 28/2010[19]), the tool which Italy used *prima facie* to give effect to the Mediation Directive, was that the legislature in Rome, rather than *proposing* mediation as a viable *alternative* to court litigation, *imposed* ADR as a *condition precedent* in order to bring a dispute to court.[20] In other words, a mandatory mediation attempt was provided for in a vast array of civil cases (condominium, insurance, traffic accidents, etc.).[21] This led to an uprising in the powerful Italian Bar Association (the *Consiglio Nazionale Forense*, or CNF): lawyers were afraid of being kept out of a number of small but lucrative disputes. Moreover, the idea of *imposing* mediation (albeit in the form of an "attempt") raised issues of potential contrast with the Italian Constitution as - according to its critics - unduly restricted access to justice.

It is not the appropriate venue to summarize the complex path which led to the current legislative framework (which included several interventions by the Government, the Parliament, and the Constitutional Court[22]); what is important to

19） The Italian word used for "mediation" was traditionally "conciliazione", as the closer lexical translation, "mediazione", is another and different legal institution (*i.e.* the contract by which a subject helps two parties to enter into another contract, Article 1754 of the Italian Civil Code). The Decree used both terms, implying that "mediazione" means "mediation", while with "conciliazione" (conciliation) denotes the result of reaching a settlement agreement. One scholar (ironically) dubbed the procedure "mediaconciliation": see Gianluca Cosmelli, 'Effetti immediati di una sentenza pubblicizzata ma non pubblicata, ovvero l'incostituzionalità della c.d. mediazione civile obbligatoria (nota minima... al comunicato stampa della Corte Costituzionale Del 24 Ottobre 2012)' (*ConsultaOnLine*, 24 ottobre 2012).

20） In doing so the Italian legislature stretched to the maximum limit the provisions of recital 14 ("Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive") and Art. 5.2 ("This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system") of the Directive.
This has been criticized by some scholars, such as Jacqueline M Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' (2012) XXXVII North Carolina Journal of International Law and Commercial Regulation 981, 993.

21） Art. 5, D.Lgs. 28/2010.

22） The Italian Constitutional Court ruled, with Ruling no. 272/2012, D.Lgs. 28/2010 to be unconstitutional, but the decision is not based on the merits of the recourse (*i.e.* the restriction of access to justice), rather on legislative procedural grounds (*i.e.* the Government exceeded its mandate in creating the delegated legislation). See Giuseppe

underline is that heresy has prevailed, and the D.Lgs. 28/2010 was the spark which ignited a number of reforms in the same direction.[23)]

3. ADR in Italy today: a summary[24)]

3.1 Mediation

From a purely quantitative point of view, the most significant type of ADR in Italy is the mediation introduced by the above-mentioned D.Lgs. 28/2010 (later modified by Legislative Decree 69/2013 converted into Law 98/2013). The idea that a mandatory mediation attempt before disputes may be brought to the court was kept in a number of civil matters, among which are: condominium, rights *in rem*, division, inheritance, lease, medical malpractice, banking and financial contracts (Art. 5, D.Lgs. 28/2010). If the parties fail to attempt to mediate their disputes, it is not possible to proceed to court: during the first hearing, either *ex parte* or *ex officio,* the judge must acknowledge the situation and refer the parties to mediation. Of course, mediation procedures are available also on a purely voluntary basis for disputes not covered by the mandatory attempt, but statistics clearly show this option is not particularly popular.

One of the most controversial aspects of the mediation "attempt" was to define what kind of activities are sufficient to satisfy this procedural requirement. According to the law, it is enough to convene a single session; if parties agree that it is not possible to find an amicable solution, the procedure may be interrupted

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Conte, 'The Italian Way of Mediation' (2014) 6 Yearbook on Arbitration and Mediation 180, 187.

23） Michele Angelo Lupoi, 'Facing the Crisis: New Italian Provisions to Keep Disputes out of the Courtroom' (2014) 19 Zeitschrift fuer Zivilprozess International Jahrbuch des Internationalen Zivilprozessrechts 95.

24） Two practical handbooks on this matter are Luca Lupoli, *Manuale delle Alternative Dispute Resolution: le ADR nella normativa italiana ed europea* (Guida editori 2016); Giulio Spina, *Codice operativo dei nuovi ADR: con schemi, formule e focus tematici : mediazione civile, negoziazione assistita, arbitrato di prosecuzione, ADR consumatori* (Pacini giuridica 2016).
Japanese readers may also refer to: Masaki Sakuramoto and Giorgio Fabio Colombo, 'Itaria Ni Okeru Shihō Akusesu' in Masahiko Ōmura (ed), *Shihō akusesu no fuhen-ka no dōkō* (Chuo University Press 2018).

and each party is free to resort to court litigation (Art. 5, para. 1 bis, D. Lgs. 28/2010).

Mediation procedures are managed by institutions registered with the Ministry of Justice (Art. 16, D. Lgs. 28/2010): the Ministry has a duty to verify that mediation centres meet the requirements of "efficiency" and professionality imposed by the legislation. The mediators operating with those institutions need to have undergone specific training, but practicing attorneys admitted to the Bar are *de jure* allowed to operate as mediators. They still are, however, under the duty to attend periodic training courses and to be fully updated on mediation (Art. 16, para 4 bis, D. Lgs. 28/2010). This change from the originally approved legislation, which "magically" turned scores of lawyers into mediation experts, elicited criticism and was labelled as an inglorious surrender to the Bar association.

The procedure itself is regulated by Art. 8, D.Lgs. 28/2010. Once the request for mediation has been deposited, the person in charge of the institution appoints a mediator and convenes a session within 30 days from the date of deposit. During the entire procedure, parties must be assisted by a lawyer.[25] Again, this was a major concession to the Bar,[26] and at the same time a major deviation from the principles set forth by the Directive, which affirmed that legal assistance should be allowed when desired but never imposed.[27] The mediator has to take an active

25） Neil H Andrews, 'Mediation: International Experience and Global Trends' (2017) 4 Journal of International and Comparative Law 217, 237 defines it "a manifest concession to a powerful national lobbying group". See also Nicolò Trocker and Giacomo Pailli, 'Italy's New Law on Mediation in Civil and Commercial Matters: Solutions, Challenges and Unresolved Issues' (2013) 18 Zeitschrift fuer Zivilprozess International 75.

26） Both contested provisions were made law by the highly debated Law Decree 21 June 2013, n. 69 (so-called "Decreto del Fare"), which was indeed also the result of a tough negotiation between the Italian Government and the Bar Association. Another major concession to the Bar was the removal of disputes relating to traffic accidents from the scope of mandatory mediation. As pointed out by Conte, Conte (n 22) 190, "The Italian Government has shown itself to be very stubborn in pursuing mandatory mediation model." Incidentally, Giuseppe Conte is currently the Prime Minister of Italy.

27） Directive 2008/52/EC, recital 13: "The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time."
This issue was recently dealt with by a court order issued by the Tribunal of Vasto on 9 April 2018. In that dispute, one of the parties claimed that imposing the presence of lawyers in mandatory mediation procedures was a violation of EU law and, in particular, of Art. 6 and 13 of the European Convention on Human Rights and Art. 47 of the Charter of Fundamental Rights of the European Union, as it imposed undue costs for accessing

role: they are in fact under the duty to try to have the parties reach an agreement; the procedure must not last more than 3 months.

If either party refuses to take part in the mediation proceeding, in a subsequent litigation, the judge may, under Art. 166, para 2, Code of Civil Procedure, use this fact as evidence against that party. Moreover, when mandatory mediation attempts are concerned, if a party fails to appear in the mediation but shows up in court, they will be sanctioned with a fine equal to the filing fee for the litigation proceedings.

In case parties are able to reach an agreement, the mediator will draft a document to that effect. Parties have to sign it and once the document has been executed, it is fully enforceable (Art. 12, D.Lgs. 28/2010).

Another peculiarity (or heresy) of Italian legislation is that when the parties fail to reach an agreement, the mediator themselves is allowed to propose a solution. If either party refuses that, of course no settlement is reached, but if parties start a court proceeding and the judgment in court is equivalent to the mediator's proposal, the party which refused the agreement and prevailed in court will have to shoulder the whole of the procedural costs - this is provided for by Art. 11, D.Lgs. 28/2010.

In order to make mediation even more attractive, the legislature has granted some tax benefits for parties availing themselves of such a procedure: each party has the right to deduct procedural expenses up to 500 Euro (if an agreement is reached) or 250 (if it is not). Moreover, the conciliation agreement may be recorded for free in case its value is 50,000 Euro or less.

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justice. The Tribunal found that no such violation exists, also relying on Judgment 14 June 2017, n. 457 of the Court of Justice of the EU, which stated "[...] the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires."

3.2 Conciliation

Aside from the procedures embedded in civil litigation (*e.g.* in labor or family disputes), out-of-court conciliation has largely been substituted by mediation. Before the enactment of D.Lgs 28/2010, the legislature had created several kinds of conciliation procedures, especially in the area of consumer law. Some of them are still in force, such as that for disputes between suppliers and sub-suppliers (Art. 10, Law 192/1998).

As far as numbers are concerned, the most significant conciliation procedure is the one provided for telephone and internet services. In the 1990s and 2000s, with the mass diffusion of the Internet, a wide array of problems has occurred due to connection problems and various online scams. This generated a massive number of disputes, most of which were for a low amount but, at the same time, particularly complex from an evidentiary point of view. All those differences risked ending up in the already overburdened court system (particularly in summary courts), making the situation even worse. In 2002, the Italian Authority for Telecommunications (AGCOM) enacted Deliberation 182/02/CONS, which provides for a mandatory (again) conciliation attempt in case of disputes involving consumers as claimants and telephone service providers as respondents.[28)]

The matter is presently governed by Deliberation 173/07/CONS. Conciliation attempts, which are still mandatory, are mostly carried out before regional bodies of the Authority (called Regional Committees for Telecommunications or Co.Re. Com.), but may also be carried out by other accredited mediation bodies (such as those organized by local Chambers of Commerce).

The legislation was challenged before the Italian Constitutional Court[29)] *and* the European Court of Justice,[30)] but eventually resisted them and it is still fully in force.

28） The opposite situation did not require service providers to refer to conciliation, because claims for payment based on documentary evidence may follow an expedited court procedure.

29） See Constitutional Court, Judgment 403/2007.

30） European Court of Justice, Joined Cases C-317/08 to C-320/08 (the *Alassini* judgment). The principle set forth by the Court is that "the principles of equivalence and effectiveness or the principle of effective judicial protection preclude national legislation which imposes, in respect of such disputes, prior implementation of an out-of-court settlement

3.3 Assisted Negotiation

Among the several attempts by the legislature to relieve courts from the excessive amount of disputes, Legislative Decree 132/2014 (converted into Law 162/2014) created "assisted negotiation" (Art. 2-11).[31] Under this procedure, parties to a difference may decide to "cooperate in good faith and loyalty to amicable settle the dispute with the assistance of lawyers." This decision must be taken in writing, by formally entering into a written agreement. It is a professional duty upon the lawyer to inform their clients about the availability of such procedure. When the dispute is about car accidents or the amount in dispute is below 50,000 Euro, the assisted mediation becomes mandatory, and it is not possible to bring the case to court unless a settlement has been attempted.

When the parties opt for this procedure, they are under the duty to negotiate (together with their lawyers) for at least 30 days. If they are able to find a solution, the agreement is formally signed by parties and lawyers, and it is immediately enforceable.

The refusal to take part in the negotiation may be evaluated negatively by the judge in a subsequent litigation and may lead to a negative decision on procedural costs (as provided for by Art. 96 and 642, first para., Code of Civil Procedure).

3.4 Referral to arbitration

Legislative Decree 132/2014 has created yet another path to reduce court litigation. According to its Art. 1, when a dispute is pending before the District Court (*Tribunale*) or even the Court of Appeals (*Corte d'Appello*), the parties may

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procedure, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires."

31）Gianfranco Dosi, *La negoziazione assistita da avvocati* (Focus 17, 2. ed. aggiornata e ampliata, G Giappichelli 2016).

submit a joint request to refer the dispute to arbitration (provided, of course, that the subject matter of the dispute is capable of being settled by arbitration). The procedure is managed by the territorially-competent Bar Association: arbitrators are chosen by the President of the Bar Association among lawyers enrolled with that Bar with a seniority of three years or more.

If the so-appointed arbitral tribunal is unable to render an award within 12 months after parties have accepted the appointment, the arbitration is automatically finished and litigation will resume.

3.5 Consumer ADR

In 2013, the EU enacted yet another significant instrument in the regulation of ADR: the Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (hereinafter the "Consumer ADR Directive").

The Consumer ADR Directive, which, in the eyes of EU institutions, was made necessary by the lack of development and consistency of ADR legislation across European countries,[32] focused on providing consumers with a cost-free, effective, and accessible procedure to solve their disputes with business entities and service providers.

Italy implemented the directive with Legislative Decree 130/2015, which amended the so called "Consumer Code" (D.Lgs. 206/2005), creating the new Art. 141 (divided in the separate articles, to 141-*decies*). This time, the new legislation does not radically depart from the European model. To the contrary, Italy - correctly - decided to make Consumer ADR free from the mandatory intervention of lawyers.[33] The most significant innovations are aimed at insuring that bodies offering ADR services to consumers are fully transparent (*e.g.* by publishing

32） See Recital no. 5, Directive 2013/11/EU.

33） "In the framework of ADR procedures it must be guaranteed that [...] b) parties are informed that they are not under obligation of being assisted by an attorney or a legal advisor, but they have the right to ask for an independent opinion or to be represented or assisted by third parties at any time during the procedure." The fact that this is provided for by Section II-*bis*, Art. 141-*quater*, para 4, point b) is revealing of how comically complex and convoluted Italian legislation may become.

statistics on their activities and by maintaining a functioning and easily accessible website[34]), respect quality requirements, etc.

Another important point is that the new legislation recognized the so-called joint conciliation (*conciliazione paritetica*) put in place between Consumers' Associations and business entities to solve consumer disputes. Originally born under the telecommunication conciliation mentioned above, it is now more widespread across several sectors and specifically regulated by Art. 141-*ter*.[35]

4. Comparative remarks

This dizzying flurry of several, partly related, barely coordinated pieces of legislation clearly shows the intention of the Italian legislature to do whatever they could to bring disputes out of court. In doing that, Italy positioned itself in a rather unique situation in the comparative panorama: some norms are in line with the prevailing practice in ADR legislation,[36] some are the result of an extensive, sometimes "extreme", use of the freedom granted under the EU framework,[37] while others are simply unjustifiable and can be explained only as purely political choice (such as the decision to make every attorney a qualified mediator, or to provide for mandatory legal assistance in civil and commercial mediation procedures), or by the need to keep as many disputes as possible out of court.[38]

The most striking feature of the Italian style of ADR is, of course, the widespread use of mandatory mediation. Some form of pre-litigation compulsory ADR attempt is neither new[39] in the Italian experience nor unique to Italy,[40] but

34） Art. 141-*bis*, D.Lgs. 206/2005.
35） The Italian legislature could not, however, refrain from making things complex again from a linguistic point of view: this conciliation procedure is in fact called "negotiation" in the Code.
36） Such as the direct enforceability of the conciliation agreement.
37） As mentioned before, the Directive does not forbid the use of mandatory mediation in and of itself.
38） I would enlist under this category the possibility for the mediator to propose an agreement *ex officio*.
39） Before D. Lgs. 28/2010, mandatory conciliation attempts were mostly found in family law and labour law (or quasi-employment contracts such as sub-supply).
40） Kendall D Isaac, 'Pre-Litigation Compulsory Mediation: A Concept Worth Negotiating' (2011) 32 University of La Verne Law Review 165.

this "oxymoron"[41] has rarely been used on such a large scale.

This peculiar legislative framework solicited, of course, several critical reactions, and it faced - as seen - challenges before both national and European courts.[42] In comparative terms - and so much for the harmony of intra-EU legislation - when the same issue was posed in other European jurisdictions, the potential contrast with Art. 6 ECHR was solved very differently.[43]

In the long run, however, Italy was praised by the very same European institutions which, in the beginning, were skeptical about Italian "heresy". In a letter the Rapporteur for the Mediation Directive MEP Arlene McCarthy sent to the Ministry of Justice of Italy in 2014, she clearly says that the Italian mediation model was "an example the entire EU should learn from."[44]

Europe is still indeed in search of some harmonization in this area[45] : it cannot

41） Dorcas Quek, 'Mandatory Mediation: An Oxymoron? Examining the Feasibility of Implementing a Court-Mandated Mediation Program' (2010) 11 Cardozo Journal of Conflict Resolution 479.

42） See European Court of Justice, C-75/16 (*Menini* judgment), where the principles expressed in the *Alassini* case were reaffirmed, almost *verbatim*: "the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs — or gives rise to very low costs — for the parties, and only if electronic means are not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires."

43） This is the case of the UK, where first the *Dunnet* judgment (Dunnett v. Railtrack, [2002] EWCA (Civ) 303, [2002] W.L.R. 2434 (Eng.)) affirmed that "successful parties who had refused to mediate, could be prevented from receiving costs that they would otherwise be awarded" (Jacqueline Nolan-Haley, 'Mediation Exceptionality' (2009) 78 Fordham Law Review 1247), and then the *Halsey* case (Halsey v. Milton Keynes Gen. Hosp., [2004] EWCA (Civ) 576, [2004] W.L.R. 3002 [9] (Eng.)), under which it is affirmed that compulsory referral to mediation would violate Article 6 of the ECHR.

44） Quoted in Giuseppe De Palo and Romina Canessa, 'Sleeping - Comatose Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union' (2014) 16 Cardozo Journal of Conflict Resolution 713, 723.

45） Machteld W de Hoon, 'Making Mediation Work in Europe. What's Needed is a New Balance Between Mediation and Court Proceedings' (2014) 20 Dispute Resolution Journal 23. See also European Commission, 'Mediation in Member States' (18 January 2019): "Mediation is at varying stages of development in Member States. There are some Member States with comprehensive legislation or procedural rules on mediation. In others, legislative bodies have shown little interest in regulating mediation. However, there are Member States with a solid mediation culture, which rely mostly on self-regulation."

be denied that several European legislators have strayed away from ADR orthodoxy and decided to implement reinforced mediation mechanisms. While Italy is clearly exceptional, other countries have opted for mandatory referral to mediation by courts,[46] cost sanctions in case of unjustified refusal to take part in a mediation process,[47] and financial or tax incentives for parties willing to engage in mediation.[48]

However, before pointing to Italy as a good success story, it is necessary to remember how complex and confusing the legislation in the country is. As correctly pointed out by Elisabetta Silvestri, even when considering ADR a positive part of the dispute resolution system, Italy did "too much of a good thing."[49] Introducing mandatory mediation procedures on such a scale was already a huge leap in the dark; the Italian legislature added, on top of that, a wide array of other instruments, and this rushed legislation inevitably resulted in a lack of coordination, the effects of which are still in plain sight.[50]

In this comparative framework, how about Japan? It seems that the very

46）*E.g.*, the Czech Republic, Law 202/2012.

47）"An unreasonable refusal by one party to participate in the introductory session describing the benefits of mediation is sanctioned in the Czech Republic by limiting the costs awarded by the court if it decides in favour of that party. Similar sanctions can be found in Slovenia. In Romania, the sanction used for non-compliance with mandatory information sessions regarding mediation benefits is the inadmissibility of the court case. In Hungary and the United Kingdom, before filing a court case, the parties must show that they have tried to settle the dispute -directly, or with the assistance of a mediator - and a party that fails to bring proof of such efforts may bear the court fees of the other party, regardless of who wins in the litigation process." Giuseppe De Palo and Leonardo D'Urso, 'Achieving a Balanced Relationship between Mediation and Judicial Proceedings' in *The Implementation of the Mediation Directive 29 November 2016* (European Parliament 2016).

48）"These benefits are often in the form of financial incentives for the parties coming to an agreement after mediation, such as reimbursement of court fees in Slovakia and Estonia, or the refund of a stamp duty as in Bulgaria and Latvia." ibid.

49）Elisabetta Silvestri, 'Too Much of a Good Thing: Alternative Dispute Resolution in Italy' (2017) 21 Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement 77.

50）"The scope of application of mediation and assisted negotiation is not clearly marked, and the overlapping of the two mandatory ADR methods is not only possible but it is a practical problem whose solution is far from settled. It is a problem showing a good measure of carelessness in passing reforms that could make the resolution of disputes more and more difficult: in fact, the question is not which ADR procedure to choose, but how to avoid the negative consequences of making the wrong choice, since for a variety of disputes both mediation and assisted negotiation are mandatory, and to start off on the wrong foot (so to say) can be extremely prejudicial." ibid 88.

conservative, "orthodox" approach taken by the Japanese legislature[51] is very far from the activism observed in Brussels, let alone in Rome.[52]

5. Conclusions

In mediation training courses, everybody learns the story of two mediators, a bad one (a mother) and a good one (a grandmother), who help two unruly sisters to efficiently split an orange. The Italian legislature came and locked the entire family in a room and see whether they could settle the dispute. Rather than creating a mechanism capable of generating win-win solutions, law in Italy thought about the most efficient way to literally shovel disputes out of the court systems, substantially ignoring the at-the-time prevalent ADR theory.

Mandatory mediation is criticized not only from a purely ideological point of view, but also under a *technical* perspective[53] : according to the critics, pushing people into a process which should be voluntary prevents establishing the appropriate mindset to reach an amicable solution.[54] The debate has nevertheless taken on the colours of a theological dispute, and scholars in the field are rich in vivid expressions.

On the side of ADR orthodoxy, stand academics such as Jacqueline M. Nolan-Haley, who is eager to remind us that "In short, we need a renewed appreciation of consent in mediation",[55] "Non-consensual mediation may help to clear dockets, but it is a poor substitute for the real thing",[56] "The central ideology of mediation

51） Aya Yamada, 'ADR in Japan: Does the New Law Liberalize ADR from Historical Shackles or Liberalize It?' (2009) 2 Contemporary Asia Arbitration Journal 1.

52） Points of similarity - but not identity - with Italy are, however, involvement of attorneys (in the case of Japan, mediation centres must refer to attorneys when the dispute involves complex legal matters) and the general supervision from the Ministry of Justice on the whole system. See Giorgio Fabio Colombo, 'La Promozione Dell'ADR Nel Giappone Contemporaneo. Riflessioni Critico-Quantitative Sulla Litigiosità in Giappone' (2012) 3 Annuario di diritto comparato e di studi legislativi 397.

53） Gary Smith, 'Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not' (1998) 36 Osgoode Hall Law Journal 848.

54） Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' (n 20) 1008.

55） Jacqueline M Nolan-Haley, 'Mediation: The Best and the Worst of Times' (2014) 16 Cardozo Journal of Conflict Resolution 731.

56） ibid 737.

is voluntariness. Tampering with this principle could wreak havoc with real access to justice",[57] and ventures to state that, as far as developments in mediation law around the world are concerned, "The age of darkness is upon us."[58]

In the corner of heresy, among others stands Giuseppe De Palo, who famously (or notoriously) asserted that "You need to kick people into the mediator's room, or else there are no mediations."[59] To the custodies of orthodoxy, he says "Voluntariness [...] is the false Prince Charming as far as dispute resolution policy is concerned."[60]

It is clear that, in this duel, the heretics are closer to the legislature, at least in the EU.[61] In this sense, the results of the study commissioned by the European Parliament "Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU"[62] shows that, among the 861 ADR experts consulted, the most popular option to revitalize ADR in the Old Continent is "make mandatory mediation in certain categories of cases", followed by "require mandatory mediation information sessions before litigation".

The idea that agreements resulting from mediation should be enforced is now part of the prevailing legal standard across the world, as also demonstrated by the Nations Convention on International Settlement Agreements Resulting from Mediation (the so-called "Singapore Convention"), open for signature on August

57） Nolan-Haley, 'Is Europe Headed Down the Primrose Path with Mandatory Mediation?' (n 20) 985.

58） Nolan-Haley, 'Mediation: the Best and the Worst of Times' (n 55) 736.

59） Words of Giuseppe De Palo, quoted in: Dahlia Belloul, 'Mediation All' Italiana (CDR)' (*International Institute for Conflict Prevention & Resolution*, 25 June 2013) <https://www.cpradr.org/news-publications/articles/2013-07-10-mediation-all-italiana-cdr> accessed 24 April 2019.

60） De Palo and Canessa (n 44) 730.

61） It is not by chance that some of the most relevant policy-making documents were drafted (also) by the "Arch-Heresiarch" Giuseppe De Palo. See Giuseppe De Palo and others, 'Rebooting the Mediation Directive: Assessing the Limited Impact of Its Implementation and Proposing Legislative and Non-Legislative Measures to Increase the Number of Mediations in the EU' (European Parliament 2013) and Giuseppe De Palo, 'A Ten-Year-Long "EU Mediation Paradox". When an EU Directive Needs To Be More...Directive' (European Parliament 2018).

62） De Palo and others (n 61).

1, 2019 in Singapore,[63] but the enforceability issue is not a major breach of orthodoxy. Whether more radical deviations, such as mandatory mediation, will become the standard outside Italy is still to be seen: in the meantime, the theological battle rages on.

63） This convention has the aspiration to become the functional equivalent to the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. See Eunice Chua, 'The Singapore Convention on Mediation—A Brighter Future for Asian Dispute Resolution' [2019] Asian Journal of International Law 1.