

# THE ITALIAN MODEL OF CIVIL AND COMMERCIAL MEDIATION

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**Abstract:** mediation is, both in *common law* and *civil law* countries, one of the main instrument to stem the crisis of civil justice and to deflate the workload of the courts. However, despite the regulations introduced at the state level, the statistical studies over the use of this institute not always appear positive. A recent study sponsored by the European Parliament identifies the lack of adequate «pro-mediation policies, whether legislative or promotional» as the central factor of the modest use of the mediator's activity and suggests to promote its use through the introduction of procedures based on a «*mitigated form of mandatory mediation*». In this regard, the Italian regulatory experience is indicated as a positive example of “mitigated compulsory”, able to promote the use of mediation. A global examination of the Italian statistics shows, nevertheless, some problems such as the lack of participation of the parties to the proceedings and the difficulty of reaching an agreement even in front of a mediator. The implementation of the sanctions, the extension of the reporting duty of the mediator, the identification of new ways of conducting information session and writing the verbal mediation are some of the possible reforms to bring to Legislative Decree no. 28/2010.

**Keywords:** mediation, conciliation, court-connected mediation, alternative dispute resolution, case management.

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## 1. INTRODUCTION: THE BIRTH OF ADR

In the last few years, the increase of the economic activities and the establishing of new rights have determined on a global basis the progressive increase of legal dispute. The inability of modern legal systems to respond effectively to this phenomenon has multiplied the operating costs of the justice system, undermining some of the fundamental guarantees designed to determine a fair trial, as the right to obtain justice within a reasonable time.

In an attempt to deflate the workload of the courts, both in common law and civil law regulations, they have developed forms of conflict resolution alternative to ordinary court proceedings, known by the acronym “A.D.R.”<sup>1</sup>.

The success achieved in the United States through these procedures has encouraged the spread of the system “multidoors court house”<sup>2</sup> on a global scale, determining the birth of a plurality of conciliatory and evaluating proceedings. National legislators, among the different forms of ADR, have selected models considered the most appropriate to their own legal tradition and to contingencies expressed by the judicial system. In this context one of the mechanisms which enjoys greater credibility is the mediation, which is «firmly established in many legal systems» thanks to its characteristics of flexibility and its ability to offer an «high level of control to the parties»<sup>3</sup>. The recourse to the activity of the mediator allows, in fact, to «explore possible options for resolving the dispute»<sup>4</sup>, coming to a customized solution (“tailor-made solutions”) of the dispute that is the subject matter of the mediation, within a procedure in which the autonomy of the parties is fully explicated at all stages of proceedings, from the decision on participation to the choice to join or not to a concerted solution<sup>5</sup>.

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<sup>1</sup> On the large existing bibliography s. lately: C. ESPLUGUES, *Civil and commercial mediation in Europe*, II, Cambridge, 2014; C. J. S. HODGES, I. BENOHR, N. CREUTZFELDT-BANDA, *Consumer ADR in Europe*, Oxford, 2012; A. MIRANDA, “Le Origini della Mediazione nell’esperienza inglese”, in A. PERA, M. RICCIO (ed.), *Mediazione e Conciliazione. Diritto interno, comparato e internazionale*, Milano, 2011, pp. 85 y ss.; B. BEELDENS, “Les modes alternatifs de résolution des litiges: la spécificité de la médiation”, *Tijdschrift voor Belgisch burgerlijk recht*, n.o 6, 2010, pp. 260 y ss.; V. VARANO, *L’altra giustizia. I metodi alternativi di soluzione delle controversie nel diritto comparato*, Milano, 2007. On the reasons of the growing development of ADR s. most recently the interesting contribution of: M. R. FERRARESE, “Formante giudiziario e mediazione: confluente e differenze”, in N. TROCKER, A. DE LUCA (ed.), *La mediazione civile alla luce della direttiva 2008/52/CE*, Firenze, 2011, pp. 1-9.

<sup>2</sup> On the system “multidoors court house” s. M. A. FODDAI, “Alle origini degli Alternative Dispute Resolution: il caso degli Stati Uniti d’America”, *Riv. Dir. Econ., Tras. e Amb.*, n.o 10, 2012, pp. 407 y ss.; B. B. FRIEDMAN, “Popular Dissatisfaction with the Administration of Justice: a Retrospective (and a Look Ahead)”, *Indiana Law Journal*, vol. 82, n.o 5, 2011, pp. 1193 y ss.; L. LEVIN, R. WHEELER, *The Pound Conference: Perspectives on Justice in the Future*, Proceedings of National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, Minnesota, 1979.

<sup>3</sup> Quotes are taken from C. ESPLUGUES, *Civil and commercial mediation in Europe*, cit., p. 4 and p. 12.

<sup>4</sup> L. NUSSBAUM, “Mediation as regulation: expanding state governance over private disputes”, *Utah Law Review*, Forthcoming UNLV William S. Boyd School of Law Legal Studies Research Paper, 2015, pp. 1-55.

<sup>5</sup> Among the different definitions of mediations seems particularly suited to describe the phenomenon on a global scale the one developed by the American Arbitration Association, together with the American Bar Association and the Association for Conflict Resolution. On the basis of this definition: the “mediation is a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute”. The definition is available at the website: [www.americanbar.org](http://www.americanbar.org).

The voluntary nature of mediation did not prevent its progressive attraction in the justice system or hampered the introduction of schemes that force litigants to experience the mediation procedure (whether “informative” or “on the merits”) as condition of proposability or admissibility of the document instituting the proceedings.

It is not hard to see how, in several legal systems, the mediation is not longer «simply “alternatives” to litigation», but it has become a «core components of the judiciary» and it has been integrated with «the litigation process»<sup>6</sup>.

The introduction of mechanisms of “mandatory mediation” has helped to amplify this trend and to enforce the implementation of Regulations in this field.

In the United States, for example, it is possible to find many cases of “institutionalization” of mediation, from the judicial mediation, in which is expressed the power of case management of the judge as states the Rule 16<sup>7</sup>, to the programs of “court annexed ADR”<sup>8</sup>. Within these procedures, in particular, have increased the cases that require to evaluate the participation in a mediation sessions and establish penalties for the reluctant parts. In the US regulatory framework there are cases in which the document instituting the proceedings is subject to the previous experiment of mediation, as in the cases of “medical malpractice”<sup>9</sup>.

The “institutionalization” of mediation in the government regulation has seen a new phase with the introduction of more stringent rules on the procedure<sup>10</sup> and «mandatory mediation clauses directly into substantive law»<sup>11</sup>. This strengthening

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<sup>6</sup> D. THOMPSON EISENBERG, “What We Know (and Need to Know) About Court Annexed Dispute Resolution”, University of Maryland Francis King Carey School of Law Legal Studies Research, n.o 30, 2015, pp 245-265.

<sup>7</sup> The core of Rule 16 of Federal Rules of Civil Procedure is summarized by U. MATTEI, *Il modello di Common Law*, Torino, 2014, p. 133 y ss., which underlines how the rule, «amended in 1993, to further clarifying the role of composer of the controversy of the judge in the preliminary proceedings, attributes to him the right to claim that the parties or their representatives are present at the conferences or that are reachable on phone “to consider the possible settlement of the dispute or the use of special procedures for the “assistance in the resolution of the dispute”». See also: P. COMOGGIO, “La Federal Rule 16 statunitense e la disciplina italiana della conciliazione giudiziale”, *Riv. Dir. Proc.*, n.o 4-5, 2013, pp. 1105-119; C. H. CROWNE, “The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice”, *NYU Law Rev.*, n.o 76, 2001, pp. 1768-1810.

<sup>8</sup> On the system of court annexed see D. THOMPSON EISENBERG, “What We Know...”, cit.; C. MENKEL-MEADOW, “Variations in the Uptake of and Resistance to Mediation Outside of the United States”, *Legal Studies Research Paper Series*, n.o 80, 2015, pp. 189-221; F. MULLEN, “Narrowing the Gap between Rights and Resources: Finding a Role for Law Students in Court-Annexed Resource Centers”, *Journal of Law and Society*, n.o 16, 2014, pp. 35-64.

<sup>9</sup> On this point cfr. L. NUSSBAUM, “Mediation as regulation...”, cit., p. 32.

<sup>10</sup> L. NUSSBAUM, “Mediation as regulation...”, cit., p. 25.

<sup>11</sup> More recently the federal statutes have provided the introduction of appropriate contractual clauses in the main commercial, insurances, labor and transfer title contracts to prevent excessive litigation costs for companies and consumers, in the event of a dispute.

form of the State control on mediation is not only a phenomenon limited to the United States, but it also known in other legal systems in which the crisis of civil justice has motivated legislators to find out new mechanisms able to amplify the Institute capability in a deflationary view.

## 2. THE COMMUNITY FRAMEWORK

The efficiency of the civil justice system and the use of mediation have been considered, since several decades, the most topical issues also for the UE Institutions, which have adopted different measures concerning it<sup>12</sup>. In this regard, the Directive 2008/52/CE<sup>13</sup> is the main Statutory Instrument prepared by the Community legislature<sup>14</sup>. Most EU countries have used this measure not only to regulate the cross-border disputes, field limited to the Directive of 2008<sup>15</sup>, but

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<sup>12</sup> Into Community law the attention for ADR begins particularly since the nineties, the year the Green Paper on consumer access to Justice of 1993. Interest in alternative dispute resolutions has not changed over time, as shown by the recent statements of the Community legislature with the Directive 2013/11/EU of the European Parliament and of the Council of May 21st 2013, on the alternative dispute resolution of consumers and the EU Regulation n. 524/2013 relating to the online disputes of consumers. The measures adopted can be found at [www.eurlex.europa.eu](http://www.eurlex.europa.eu). For a more complete vision s.: A. PERA, M. RICCIO, *Mediazione e Conciliazione. Diritto interno, comparato e internazionale*, Milano, 2011; G. ROSSOLILLO, "I mezzi alternativi di risoluzione delle controversie (ADR) tra diritto comunitario e diritto internazionale", *Dir. Unione Eur.*, n.o. 2, 2008, pp. 349 y ss.

<sup>13</sup> The directive on civil and commercial mediation, issued by the European Council on May 21st 2008 has been published in the Official Journal n. L 136 of 24/05/2008, p. 0003. The text can be read at [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu). For more details on the Directive s.: A. DE LUCA, "La mediazione in Europa. Una questione di cultura e non di regole", *Riv. dir. civ.*, n.o. 6, 2013, pp. 1451-1481; C. BESSO, "L'attuazione della direttiva europea n. 52 del 2008: uno sguardo comparativo", *Riv. trim. dir. e proc. civ.*, n.o 3, 2012, pp. 863-888.; A. YBARRA BORES, "The European Union and alternative dispute resolution methods: directive 2008/52/CE of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters", en *Intersentia, Latest developments in EU private International law*, Cambridge, 2011, pp. 175 y ss.; E. MINERVINI, "La direttiva europea sulla conciliazione in materia civile e commerciale", *Contr. impr. Europa*, n.o 1, 2009, pp. 41 y ss..

<sup>14</sup> On the implementation in Italy of the Directive 2008/52/CE s.: D. DALFINO, "Domanda di mediazione ed effetti sulla prescrizione e sulla decadenza: l'attuazione della direttiva 2008/52/CE da parte degli Stati membri", *Il giusto proc. Civ.*, n.o 1, 2015, pp. 33-60; N. TROCKER, A. DE LUCA, "La mediazione civile alla luce della Direttiva 2008/52/CE...", cit.; D. VOLPINO, "La direttiva 2008/52/CE del Parlamento europeo e del Consiglio, del 21 maggio 2008, relativa a determinati aspetti della mediazione in materia civile e commerciale", in M. TARUFFO, V. VARANO (ed.), *Manuale di diritto processuale civile europeo*, Torino, Giappichelli, 2011, pp. 383-399; E. MINERVINI, "La direttiva europea sulla conciliazione...", cit.; E. M. APPIANO, "I sistemi A.D.R. nell'ottica del legislatore comunitario", *Contr. impr. Europa*, n.o 1, 2009, pp. 59 y ss.

<sup>15</sup> About this s. the recital n. 8 of Directive 2008/52/CE which underlines how: "the provisions of this Directive should be applied only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation procedure".

also to introduce an organic regulation of mediation in the national sphere or to rearrange the existing legislative framework<sup>16</sup>.

With Resolution 2011/2026 the European Parliament<sup>17</sup> has endorsed the progress achieved and has underlined the choice of some Member States (such as Bulgaria, Romania, Hungary and Italy) of going beyond the basic requirements of the Directive in two areas: «the financial incentives» for participating in conciliation procedures<sup>18</sup> and «the binding requirements of mediation», reporting as «these national initiatives contribute to a more effective dispute resolution», that reduces «the workload of the courts»<sup>19</sup>.

Despite the regulatory response of some Member States, the first statistical data over the use of mediation in Europe do not seem positive. In fact, according to a recent study sponsored by the European Parliament, the mediation is used in less than 1% of EU cases<sup>20</sup>. The analysis identifies the lack of adequate «pro-mediation policies, whether legislative or promotional» as the central factor of the modest use of mediator's activity and suggests to promote its use through the introduction of procedures based on a «mitigated form of mandatory mediation»<sup>21</sup>. The suggested

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<sup>16</sup> For an examination of the European situation, considering the community Directive of mediation s.: C. ESPLUGUES, *Civil and commercial*, cit.; K. J. HOPT, F. STEFFEX, *Mediation: Principles and regulation in comparative perspective*, Oxford, 2013; G. DE PALO, M. B. TREVOR, *Eu Mediation Law and Practice*, Oxford, 2012.

<sup>17</sup> Resolution of European Parliament of September 13, 2011 on the implementation of the Directive on mediation in the Member States, the same impact on mediation and its adoption by the courts, (2011/2026-INI). The document can be read at the page of European Parliament: [www.europarl.europa.eu](http://www.europarl.europa.eu). On this point s. G. SANTACROCE, "La mediazione in Europa e in Italia. Esperienze a confronto in uno studio del Parlamento Europeo. Il ruolo della mediazione nel sistema giudiziario italiano", *Temi romana*, n.o 1-2, 2014, pp. 74-80; M. C. REALE, "La mediazione civile e l'Europa - Civil mediation and Europe", *Sociol. Dir.*, n.o 1, 2014, pp. 95-120.

<sup>18</sup> Bulgaria, Romania and Hungary provide the reimbursement of State taxes paid to enter the case in Court if the dispute is successfully resolved in mediation. Also the Country of Italy has been indicated in the Resolution 2011/2026 as a virtuous model thanks to fiscal and tributary benefits provided by art. 17 of d.lgs. 28/2010.

<sup>19</sup> Cfr. point 4 of Resolution of European Parliament of September 13, 2011.

<sup>20</sup> On this point AA.VV., *Reeboting the mediation directive: assessing the limited impacts of its implementation and proposing measures to increase the number of mediations in the Eu*, 2015, visible on the website [www.europarl.europa.eu](http://www.europarl.europa.eu). The Directive 2008/52/CE has not achieved the desired results to «facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings». In fact - continue editors - only Italy has registered a number of mediations higher than 200.000 per year, while in other countries conciliation procedures have been between 500 and 10.000.

<sup>21</sup> Mitigated mandatory is mentioned because "in certain types of cases, the parties are required only to attempt an initial meeting (free) with a mediator, and not to face (and paying for) a complete mediation procedure. Each part, if not sure that mediation has good chances of success, in fact, can "esc" from proceedings during this preliminary meeting and bring the case directly to Court, with no negative consequences", in this regard s. *Reeboting the mediation directive*, cit., p. 8.

lines of action are based on two mechanisms: the attendance at a compulsory information session and/or a «mandatory mediation with the ability to opt-out if litigants do not intend to continue with the process»<sup>22</sup>.

### 3. THE FORMS OF «MANDATORY PRE-ACTION MEDIATION» AND THE LEGAL DISPUTE

The conclusions reached by European Parliament's experts are in line with the recent legislative trend of those countries traditionally reluctant to introduce prescriptive forms of ADR. In England, for example, it became operational a form of «mandatory mediation» for couples who intend to separate, that are forced to attend to an «assessment session»<sup>23</sup>. During these meetings, the parties can receive information about the mediating process and understand if, with the help of the professional in charge, the mediation is the most appropriate instrument for resolving the familiar crisis, in relation to the reason of the conflict<sup>24</sup>.

The introduction of this form of «mandatory pre-action mediation» seems to have decreased on the number of judiciary proceedings, which are reduced from 25,468 to 36.179 in the period from April to December 2014, reaching a total of 70% of mediating procedure<sup>25</sup>.

The decrease of cases registered before the ordinary courts is a phenomenon that binds together the English experience and the Italian one, where in 2014 according to statistics released by the Ministry of Justice, the cases relating disputes object of compulsory mediations have decreased by 8% compared to those introduced the year before in the judicial circuit<sup>26</sup>. This figure can be influenced by a number of variables, but with no doubts it is in part connected to the introduction of mediation as a condition of admissibility of the judicial assistance<sup>27</sup>.

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<sup>22</sup> C. ESPLUGUES, *Civil and commercial mediation in Europe*, cit..

<sup>23</sup> According to the section 10 of Children and Families Act 2014 the informative session is applied to proceedings at paragraphs 12 and 13 of Practice Direction 3A, read together with the third part of Family Procedure Rules 2010. The preliminary session is not applied, however, in certain circumstances, such as in cases of domestic violence or child abuse. Cases of exemptions are describe the Family Procedure Rules 3.8.

<sup>24</sup> The reform entered into force on April 22nd 2014. The recent development of mediation in Inghilterra and Galles s.: T. ALLEN, *Mediation Law and Civil Practice*, London, 2013; N. H. ANDREWS, "Money and Other Fundamentals: English Perspectives on Court Proceedings, Mediation, and Arbitration", *Rev. proc.*, n.o 38, 2014, pp. 449-484.

<sup>25</sup> P. CORTES, "The promotion of civil and commercial mediation in UK", University of Leicester School of Law Research Paper, nn. 15-23, 2014, pp. 1-35.

<sup>26</sup> Cfr. statistics for the period from January 1st to June 30th 2015 published by Ministry of Justice at website <https://webstat.giustizia.it>.

<sup>27</sup> The basis of tax legislation of a mandatory filter litigation has been considered more than once compatible with the constitutional and community order. About this s. in particular two judgments of the Constitutional Court: the n. 276 of July 13th 2000 and the n. 163 of June 1st 2004. Recently also the Court of Justice, by judgment of March 18th 2010, Joined Cases C-317/08 to C-320/08, Rosalba Alassini and a., Racc. I-02213, is intervened on the issue of of mandatory mediation stating that "not even the principles of equivalence and effectiveness as well as the



Such legislation has determined, in fact, a gradual increase of applications submitted, which in the year 2014 have reached a total number of 295.010<sup>28</sup>, with a growing trend that seems to be confirmed by the statistics regarding the first half of 2015<sup>29</sup>. The exponential increase of the mediation process has been accompanied by the achievement of a fair percentage of agreements, with a success rate of over 40% of cases in which the respondent party has accepted the procedure<sup>30</sup>.

With this performance the Italian regulatory, subject to improvements, as we are going to see in the following paragraphs, fully represents a best practice and it is

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principle of effective judicial protection preclude National legislation which imposes (...) the prior implementation of an out-of-court settlement 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". On the Alassini judgment cfr.: G. RIZZO, "The mandatory nature upon an attempt to settle the dispute out of court in the areas of electronic communications services between telecommunications operators and end users", *Corr. Giur.*, n.o 10, 2014, pp. 1292-1305; J. DAVIES – E. SZYSZCZAK, "ADR: effective protection of consumer rights?", *Eur. Law Rev.*, n.o 5, 2010, pp. 695-706. About the reintroduction of mediation as a condition of admissibility, after the stop imposed by the Constitutional Court with the judgment n. 272 of 2012 with the changes introduced by the Law n. 98/2013 s.

<sup>F</sup> FERRARIS, "Ultima novità in materia di mediazione civile e commerciale", *Riv. Dir. Proc.*, n.o 3, 2015, pp. 779-793; G. REALI, "La mediazione obbligatoria riformata - The reformed obligatory mediation", *Il giusto proc. Civ.*, n.o 3, 2014, pp. 72-770; E. BENIGNI, "La condizione di procedibilità nella mediazione disposta d'ufficio dal giudice", *Giur. Ital.*, n.o 3, 2015, pp. 639-643; L. BUGIOLACCHI, "La mediazione obbligatoria nelle controversie civili e commerciali dopo la conversione in legge del Decreto Letta - The mandatory mediation in civil and commercial disputes after the conversion in law of the Letta Decree", *Resp. Civ. e prev.*, n.o 1, 2014, pp. 349-359; G. CONTE, "The italian way of mediation – Il modello italiano di mediazione", *Giust. civ.*, n.o 1, 2014, pp. 163-195; P. FARINA, "Le modifiche più recenti del c.p.c. e la reintroduzione della mediazione forzata", *Giusto proc. civ.*, n.o 1, 2014, pp. 261-282; A. SANTI, "Opportunità, strategie e cautele del nuovo modello di mediazione civile e commerciale", *Le Società*, n.o 10, 2012, pp. 1105-1111; F. FERRARIS (2013), "La nuova mediazione civile e commerciale", *Riv. di dir. Proc.*, n.o 6, pp. 1462-1482; A. D. DE SANTIS, "La mediazione finalizzata alla conciliazione...", cit.

<sup>28</sup> Analyzing the statistics published by the Ministry of Justice notes that the procedures listed in 2011 were 60.810, in 2012 the number has increased to 154.879; in 2013, as a result of the judgment of unconstitutionality n. 272/2012 which has deleted the mandatory mediation from the Legal Order, instances of mediation were 41.604; in 2014 enrollments have reached a total of 295.010. On these statistics s. the website: <https://webstat.giustizia.it>

<sup>29</sup> The statistical returns published by the Ministry of Justice on the 1st half of 2015 reports an increase of 21% of the mediation proceedings registered in 2015 compared to those of 2014, see cfr. on the website: <https://webstat.giustizia.it>.

<sup>30</sup> In particular, the statistical statements show that between March 2011 and December 2012 the agreement has been reached in 43,9% of cases in which the respondent part has moine the mediation process, while in 2013 the percentage has reached 42,4% and 47,0% in 2014. In the first half of 2015 the success rate has increased up to 43,1%. For a more detailed examination of data see the website <https://webstat.giustizia.it>.

indicated in the study commissioned by the European Parliament as a positive example of “mitigated compulsory” able to promote the use of mediation. In this perspective, the results achieved in Italy will be one of the main scenarios on which the European Commission will practice, within May 21<sup>st</sup> 2016, called to report on the development of mediation in Europe and propose possible changes to Directive 2008/52 / EC.

This “proactive” activity definitely will be facilitated with reference to the Italian legal system, which has a statistical system of mediation able to highlight the operation of the Institute, its potential strengths and weaknesses. In particular, the data released by the Ministry of Justice offer the opportunity to think about two issues, the resolution of which appears essential to “revitalize” the Community model. The main issues are: 1) the lack of participation of the parties to the proceedings 2) the difficulty of reaching an agreement, despite the presence of the mediator. For both of these aspects, in Italy and in Europe, it is necessary to change regulations, increasing the State control over the rules governing the conduct of the mediation process.

#### **4. THE “PRELIMINARY MEETING” AND THE COMPLIANCY OF DEFENDANTS**

Referring to the non-adherence of the part called, the methods defined in art. 8, paragraph 4-bis of Legislative Decree 28/2010 have been proven impractical and unable to act as a deterrent<sup>31</sup>. In this perspective, the implementation of sanctions (also on the allocation of expenses) could represent the key instrument to increase the use of mediation, for the part that does not adhere to the mediation or which, while adhering, assumes an obstructive or exclusionary behavior to the success of the procedure. In the case of non-participation, the parties (and their lawyers) should be forced to explain the reasons of the absence to allow the court to express the appropriate assessments, as already happens, for example, in the English legal system. The Chapter 11.56, recently taken by the Court of Appeal in the case PG II SA v OMFS Co. 1 Ltd. 78<sup>32</sup>, suggests the lawyers and their clients how to behave when they are invited to mediation and decide not to participate. In order to avoid sanctions, it is necessary also, moreover, to provide clear and comprehensive written information about the reasons that make inappropriate the use to compositional forms of ADR<sup>33</sup>. The strengthening of the sanctionary system, however, is bound to fail if not accompanied by an effective discipline of the mediation.

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<sup>31</sup> For the sanctioning power of the judge s. R. SORRENTINO, “La sanzione per mancata partecipazione alla procedura di mediazione: art. 8 paragraph 5 of Law n. 28/2010”, *Il Foro napoletano*, no. 2-3, 2012, pp. 595-610.

<sup>32</sup> PG II SA s. OMFS Co. 1 Ltd. [2013] EWCA Civ 1288.

<sup>33</sup> The Handbook ADR in par. 11.56 states also that: «not ignoring an offer to engage in ADR; (...) raising with the opposing party any shortage of information or evidence believed to be an obstacle to successful ADR, together with consideration of how that shortage might be overcome; not closing off ADR of any kind, and for all time, in case some other method than that proposed, or ADR at some later date, might prove to be worth pursuing». On the consequences of such mechanisms in the English experience s.: M. AHMED, “Implied Compulsory Mediation”, *Civil Justice Quarterly*, n.o 31, 2012, p. 151-175.



The participation of the litigants in the proceeding, in fact, could be conditioned by the way the mediative dynamics are governed, starting from the “preliminary phase”. The choice of some legal system to introduce informative sessions basically free (as in Romania, Spain, Italy) has been determined by the objective to increase the rate of adherence to the procedure. In Italy, for example, the statistics show a gradual increasing participation of the parties following the introduction of the information session<sup>34</sup>.

The Decree Law 69/2013 has also identified what kind of information shall be given to the parties and the procedure to follow at the first meeting, stating (in art. 8 of Legislative Decree 28/2010) the mediator’s obligation to determine «the function and the conducting way of the mediation»<sup>35</sup>, as well as the duty to invite the parties and their lawyers to give their views on the initiation of proceedings.

Such discipline, since the formula used by art. 8, is susceptible to modification and improvement when compared to the experience of other European countries, both in terms of disclosure requirements of the mediator and the concrete activity that this is going to carry out in the preliminary meeting. With regard to the first issue, it is relevant the absence of any indication concerning the introduction of the mediator in the Italian legislation.

This references are found in the Spanish legislation and in the draft General Scheme of the Irish Mediation Bill<sup>36</sup>. The Legislative Decree 5/2012 regulates in detail the contents of the introductory speech, forcing the mediator to inform participants «about his profession, training and background»<sup>37</sup>. The enunciation of professional skills could help to get the trust of the parties that, especially at the beginning, seems to be skeptical about the possibility of resolving the dispute through an amicable agreement. In this respect, it is even more high-performing the Irish draft law, which provides, before to initiate the procedure, the mediator’s

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<sup>34</sup> The introduction of the information session with the law n. 69/2013 played an important role influencing this statistic. The participation rate has increased from 23,7 % of the third quarter of 2013 to 45,2% of the second quarter of 2015.

<sup>35</sup> Cfr. art. 8, paragraph 1 of law n. 28/2010. on the fulfilment of compulsory information s. F. TOSCHI VESPASIANI, “La responsabilità del mediatore per inadempimento degli obblighi informativi”, *Studium iuris*, nn. 7-8, 2013, pp. 844-864.

<sup>36</sup> Ireland has implemented the EU Directive with the approval of SI 209 of 2011 European Communities (Mediation) Regulations 2011 which discipline the «cross-border disputes». In March 2012 has been published a draft law on mediation which will provide a new legal framework «to internal mediation processes». The General Scheme of Mediation Bill 2012 Draft, which incorporated many of the recommendations of the Irish Law Reform Commission, is available on the website: [www.justice.ie](http://www.justice.ie). For a review of the Irish Legislation on mediation s. also the SI No. 502 of 2010 Rules of the Superior Courts (Mediation And Conciliation) 2010. The essay will review only some aspects of the Draft, skipping the SI 209 of 2011 which has a thin regulations and not innovative profiles. For the Irish legislation on mediation s: J. MADIGAN, *Appropriate dispute resolution (ADR) in Ireland*, London, 2012; B. HUTCHINSON, *Arbitration and ADR in Construction Disputes*, Dublin, 2010.

<sup>37</sup> Art. 17 of ley 5/2012, de 6 de julio, de mediación en asuntos civiles y mercantiles, published in BOE n. 162 of July 7 th 2012.

obligation to provide participants the details about his training and his experience in mediation<sup>38</sup>. This information channels make the introductory speech particularly useful, imposing to describe not a general professional ability, but providing a complete description of its own professional skills and competences. As provided by the explanatory notes, if the parties are not satisfied by the level «experience and training» offered by the mediator, they have the opportunity to switch to legal professional<sup>39</sup>.

The need to provide full and truthful information identifies a further requirement to the mediator, which is to report in the introductory speech the possible benefits of the meditative procedure, similar to what the Romanian mediator is required to do. The current legislation in Romania has introduced the obligation to inform about the benefits of the conciliation procedure, to provide all the necessary information the parties need, to explain limits and the effect of mediation with particular regard to the case examined<sup>40</sup>. The reference to the object of the conflict seems to be in line with the need to strengthen the transparency of the procedure, promoting a conscious choice.

## 5. THE COSTS OF THE PROCEDURE AND THE PROMOTION OF THE AGREEMENT

The first mediation meeting should be a useful tool not only to make the parties closer to mediation, but also to look at the mediation as the right instrument to reach a possible agreement<sup>41</sup>. In this perspective, the mediator should have the chance to face the discussion about the object of the conflict, allowing the parties to verify, since the beginning, if there really are the conditions to reach a conciliation. For this purpose, (especially for the mediations with greater value) a fee should be granted for the first meeting, without imposing the parts excessive financial burdens. This approach presupposes a quota system of the timing of the

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<sup>38</sup> Cfr. Head 8 of General Scheme of Mediation Bill 2012 Draft which specifies the mediator's obligation to indicate «(a) details of any specialist qualifications, including training in screening techniques to assess the appropriateness of mediation, which may be relevant to the mediation process; (b) details of continuing professional development (if any) undertaken by him or her».

<sup>39</sup> The Irish Draft Law, making reference to «practice» accepted in different Codes of conduct for mediators, intensifies the obligation to provide information under the European Code which has identified, only just in case, the news sharing of mediator relating to his personal skills and professional competences. Cfr. la section 1.2 of European Code of Conduct for mediators which includes the mediator's obligation, before accepting the position, «to verify if he/she meet the necessary requirements for the position and he/she is able to conduct the mediation and, if requested, to provide all information the parts need about the case».

<sup>40</sup> Art. 29 of legea 192/2006 states that «mediatorul are obligatia sa dea orice explicatii partilor cu privire la activitatea de mediere, pentru ca acestea sa întealeaga scopul, limitele si efectele medierii, în special asupra raporturilor ce constituie obiectul conflictului». The Romanian Law, entered into force in 2006 and published by Monitorul Oficial n. 441 of May 22nd 2006, has been amended several times between the years 2010 and 2013.

<sup>41</sup> L. FRANZESE, «L'accordo conciliativo tra conflitto e controversia», *Rivista di diritto processuale*, n.o 4-5, 2013, pp. 870-888.

preliminary session and in any case a formal act to determine the real beginning of the “operating phase” of mediation.

The separation of these “moments” plays an important role to avoid, for example, problems in the management of the Italian mediation procedure. The Legislative Decree no. 28/2010 identifies, in fact, the consent of the parties and their lawyers as the necessary element to determine the “begin of the procedure”, binding the payment of the allowance of issues about substantial discussions of the conflict, but did not mention any formal act to define the boundaries between the two phases.

The Italian mediator may have to face the hard situation of having to manage the relationship between the parties that give their consent at the beginning and then refuse to pay the allowance in the absence of any written proof or that claim to have information about the dispute before deciding whether or not to adhere to the proceedings<sup>42</sup>.

The lack in the Italian legislation could lend itself to abuses from the mediators who, acquired the consent from the parties, and started the procedure, skip the aspect related to the remuneration, due to the absence of a clear duty of information<sup>43</sup>. This conduct is clearly in contrast with the Mediators European Code of Conduct that identifies in the quantification of the costs, an essential aspect of the mediator’s fair working. The art. 1.3 sets, in fact, that the appointee for the implementation of the procedure has not only to fulfill the duty of information on the «mode of remuneration which he intends to apply», but also to refuse to «accept a mediation before the principles of his/her remuneration have been accepted by all parties concerned»<sup>44</sup>. The indications of European code are fully reflected in the legislation of some European countries, in which the distinction between the different phases of the proceedings and the issue of costs appears much clearer than in Italy. In the Romanian model, in the Spanish<sup>45</sup> and

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<sup>42</sup> The first situation can be easily resolved in view of the undersigning of a specific report, in the second case, instead, it will be up to the mediator to decide whether to grant an exception to the normal procedure, allowing the discussion of certain aspects related to the substance at no cost to the parts. The mediator will have to carefully assess the situation and understand if it could be useful to treat substantial issues in the preliminary meeting. The mediator’s consent does not exclude that one or more parts could oppose to the extension of the information session. In these cases, the mediator should not start the discussion of the substantive aspects without the consent of all the participating parties of the mediation.

<sup>43</sup> The parties could give their own consent to the start of mediation and then find themselves in disagreement between them and with the same mediator about the quantification of the benefits to correspond since, as it often happens, they confers a different value to the dispute.

<sup>44</sup> The European Code of Conduct for Mediators has been drafted in 2004 from the European Judicial Network in civil and commercial matters in cooperation with the European Commission and it is available on the website: [www.ec.europa.eu](http://www.ec.europa.eu).

<sup>45</sup> The freedom of decision is in Spain a further widespread presence, because between the “sesión informativa” and the “sesión constitutiva” there is, unless another rate is agreed between the parties, a time frame that should serve to take the decision about the continuation of the mediation. *Sull’attuazione della direttiva comunitaria 2008/52/CE in Spagna v. A. DE LA OLIVA*

Portuguese ones<sup>46</sup>, for example, the drafting of a written document allows parties to adequately weigh their choice of continuing the proceedings and taking full cognizance of the costs.

In the *Legea* 192/2006, the costs of mediation, even if not clearly stated in the initial speech, they still are a necessary part of “contractul de mediere”, so as provided by art.45. In the Spanish legislation, instead, the costs are clarified in the initial speech of the mediator and they are one of the main aspects formalized in the instituting act of the “constituting” session, together with the other key elements such as the indication of the object of the judgment, the implementation program and the maximum duration necessary for the development of the proceedings. Similarly the art.16, paragraph 3, letter. h, of the Portuguese law no. 29/2013 stipulates that the “protocolo de mediação” provides the indication of the amount agreed between the mediator and the parties as compensation for its work.

The introduction of those mechanisms in the national rules to make transparent the costs can help to promote the use of mediation, raising the level of trust and confidence of end-users towards the institute. The absence of the EU Directive on this point, as well as the poor information about the difference between the “preliminary” session and the “constitutive” one, did not certainly contribute to the spread suitable models to promote conciliatory agreements in Europe.

## 6. THE POWER OF “JUDICIAL REFERRALS” AND METHODS OF PREPARING THE VERBAL

The chances of resolving a dispute amicably during a mediation increases in parallel with the degree of efficiency of the law chosen to govern the institution. The mediator’s technical and social skills become marginal elements when the professional charged has to work within regulatory systems based on “unreasonable” provisions.

The Italian case appears emblematic in relation to art. 13 of Legislative Decree no. 28/2010, which regulates the system of legal costs in the event of the proposal

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SANTOS, “La mediazione in materia civile e commerciale in Spagna”, Riv. Trim. dir. e proc. civ., n.o 2, 2012 pp. 532-550.

<sup>46</sup> See the law Portuguese mediation n° 29/2013 that at the article 16 lays down «O procedimento de mediação compreende um primeiro contacto para agendamento da sessão de pré- -mediação, com carácter informativo, na qual o mediador de conflitos explicita o funcionamento da mediação e as regras do procedimento. 2 — O acordo das partes para prosseguir o procedimento de mediação manifesta -se na assinatura de um protocolo de mediação. pelo mediador e dele devem constar: a) A identificação das partes; b) A identificação e domicílio profissional do mediador e, se for o caso, da entidade gestora do sistema de mediação; c) A declaração de consentimento das partes; d) A declaração das partes e do mediador de respeito pelo princípio da confidencialidade; e) A descrição sumária do litígio ou objeto; f) As regras do procedimento da mediação acordadas entre as partes e o mediador; g) A calendarização do procedimento de mediação e definição do prazo máximo de duração da mediação, ainda que passíveis de alterações futuras; h) A definição dos honorários do mediador, nos termos do artigo 29.º, exceto nas mediações realizadas nos sistemas públicos de mediação; i) A data».

by the mediator. This rule gives the magistrate an excessive “evaluative” power that, concretely, is the result of a disincentive to conciliatory hypotheses<sup>47</sup>.

The practice shows that the link between mediation and process, suggested by art. 13, it was not certainly able to increasing the number of agreements signed, while in this regard could play an incisive role the “mediazione ex officio”<sup>48</sup>.

The Law 98/2013 has, in fact, attributed to the magistrate a “decision” power that could require the parties to resort to the meditative procedure not only for matters identified in art. 5, paragraph 1 bis of Legislative Decree 28/2010, but in relation to any civil dispute concerning rights available. It is a matter of an important prerogative that concerns the Italian judge to enhance and increase the quality, explaining for example the reasons that are identified as foundation of the expiration in the mediation. Such information would allow the parties to understand the judge’s orientation with regard to the “possibility of mediating” of the controversial relationship, stimulating a reasoned participation in the proceedings<sup>49</sup>.

The strengthening of the power of “judicial referral” is in line with the European and extra-European trends aimed to implement the role of “case management” assigned to judges. In this respect, there are enough models to follow. As the Irish Draft that in the articles 12, 13 and 17 regulates the procedure of judicial mediation. According to the Head 12, the Court can suggests the parties, at the party’s request or at its own initiative and considering all circumstances, to use mediation and invite them to attend to an information session on the use and operation of the procedure<sup>50</sup>.

The Irish judge will carry out a probabilistic assessment on the case studies under his examination, choosing to make the parties aware of the mediation only where it believes that this procedure has a reasonable prospect of success and is able to contribute to reaching an amicable resolution of the dispute<sup>51</sup>.

The system of the Draft, based on the forecasts of the Statutory Instruments no. 502 of 2010, does not give the judge coercive powers, but it opts for persuasive/sanctions mechanisms<sup>52</sup>. If the parties decide to start the mediating procedure the

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<sup>47</sup> In fact, hardly a lawyer will expose his client to risk the consequences of Art. 13 if he refuses the solution advanced from the mediator.

<sup>48</sup> This mediation is governed by art.5, paragraph 2 of Legislative Decree no. 28/2010. On the relationship between mediation and process s. C. CONSOLO, “*La giustizia civile: quale volto dei nostri processi fra giurisdizione e ADR?*”, Il Corr. Giur., n.o 10, 2014, pp. 1263-1276.

<sup>49</sup> In this regard, for example, the order of the Court of Milan, Sez. IX, of October 23rd 2013, in which the milan judge recognizes the mediator factor of the dispute considering, on the basis of previous experience of the litigants, the parties to «confront and to adopt shared solutions» and the inability of the judicial instrument. In particular, the Court considers that «any conciliatory solution could define the conflict as a whole, while the appellate decision could only define, tout court, the dispute partially».

<sup>50</sup> Cfr. l’Head 12, 1, lett. ii of Draft.

<sup>51</sup> Cfr. l’Head 12, 5 of Draft.

<sup>52</sup> The Statutory instruments no. 502 has changed the Rules of the Superior Courts 1986, entering a New Order 56A that helps the judicial “referral” in mediation or conciliation and a new rule 1B

court will provide a guidance on how to make effective the use of the procedure<sup>53</sup>. In case of failure of the procedure, the conduct of the person who has unreasonably refused to consider the use of mediation or has unjustifiably refused to take part to an informative session<sup>54</sup> will be significant on the allocation of costs<sup>55</sup>.

The court, to assess whether the refusal is unreasonable or unjustified, will consider several factors including: the relationship between the cost of the mediation and the value of the dispute, any prejudice that might be required during the mediation and «the general circumstances concerning the proceedings and the behavior of the parties». This last point leaves room for maneuver to the judge who, in any case, will not be able to attribute importance to the behavior of the parties during the mediation. The same report filled by the mediator on the procedure result will have to be drafted in a neutral way, it will contain no comments or recommendations, so as not to damage «the general confidentiality privilege» provided by the Head 10<sup>56</sup>.

This way of filling the report looks definitely questionable in the cases where the failure of mediation is attributable to the exclusive responsibility of a part of participants or their lawyers that do not cooperate together. In these situations it would be better to send the judge a report containing useful information to evaluate the conduct of the litigants. The way chosen by the Italian system to make verbal mediation deformed and totally devoid of a minimum of compulsory contents, even in cases where the parties formulate proposals, does not help to build a bridge between the judicial and mediating proceedings, or it does not allow the judge to take a decision on the allocation of costs, beyond the mechanism of the Art. 13.

The attempt operated recently by some Italian judges to identify the possible contents of the report is made to increase communication with the judicial body. The Court of Vasto, by order dated June 23<sup>rd</sup> 2015, for example, has invited the mediator «to verbalize the reasons given by the parties to justify their absence» and has authorized him to make a proposal for conciliation also in absence of an unanimous request of the disputants<sup>57</sup>. In addition, the judge has ordered, as a burden on the person who activates the mediation, the obligation to transmit

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in the Order 99 on the system of legal costs in cases of refusal or failure without good reason of any party to participate in any ADR process referred to in Order 56A».

<sup>53</sup> Cfr. l'Head 12, 2, lett. c of Draft.

<sup>54</sup> On this s. l'Head 17, 1, of Draft.

<sup>55</sup> The cost allocation system is not applicable to proceedings in a family law matter if there are the conditions set out in Head 17, 3 of Draft.

<sup>56</sup> Cfr. l'Head 13 of Draft.

<sup>57</sup> Cfr. The order of the Court of Vasto of June 23<sup>rd</sup> 2015. L. FRANZESE (2013) also concluded favourably, "The settlement agreement between conflict and controversy", cit., writes: «mediator is not a notary who receives and documents the intention of the parties; he takes part in the decision-making process through, for example (...) the power, strongly criticised but necessary at the same time, to formulate in person a resolute proposal of the dispute. After having heard and conducting the comparison of the parties and noted the failure of the mediation, the mediator is brought to express the idea he has arrived on how the dispute can be pacified».



directly to the mediator the instructions imposed by the order, advising the parties to lodge at the Registry a note on the outcome of the procedure and prescribing all the indications to include<sup>58</sup>.

The required information may also concern «the non-participation (active) of the parties (substantial) without a justified reason»<sup>59</sup>, with a view to avoiding that «unfair and dishonest behaviors held in the mediation» could obstruct the conclusion of the agreement<sup>60</sup>.

The effort of the Italian courts to make more “communicative” the mediation’s report seems to manifest the same need, already reported in the United States, of a greater formalization of the mediation procedure to ensure the parties and the mediator a space of viability which indentifies clear rules, useful in order to reach agreements and to increase public confidence towards alternative forms of dispute resolutions. These purposes must represent the best way to reform both European and Italian model of mediation.

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<sup>58</sup> Cfr. the orders of March 17th-18th 2014 issued by the Court of Florence, and also the order of January 17th 2015 adopted by the Court of Siracuse, in which the judge asked the parties to communicate the outcome of the mediation by a note that had to include «all informations about the possible non-participation of the parties in person without justification, all the possible impediments that had prevented the effective starting of the mediation procedure; and finally, with regard to the settlement of court costs, the reasons for rejection of any settlement proposed by the mediator». On the importan participation of the parties to the mediation and all the factors s.: F. FERRARIS, “Partecipazione personale ed effettività del procedimento: due elementi essenziali per il corretto espletamento del tentativo obbligatorio”, *I Contratti*, n.o 7, 2015, pp. 689-696; G. RAITI, “Primo incontro in mediazione e condizione di procedibilità della domanda ai sensi del novellato art. 5, comma 2 bis, d.lgs. 4 marzo 2010 n. 28”, *Riv. Dir. Proc.*, n.o 2, 2015, pp. 558-574; E. BENIGNI, “Le condizione di procedibilità...”, cit.

<sup>59</sup> Cfr. the order of March 18th 2014 adopted by the Court of Florence.

<sup>60</sup> About this the order of november 1st 2014 of the Court of Rome, and the order of January 21st 2015 in which the roman judge has expressly stated that at the hearing set ex Art. 420 Code of Civil Procedure for the substance would provide the «prior consideration of the issues actually discussed and the outcome of the mediation conducted according loyalty and probity, mediation is exercised in accordance with fairness and probity».

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