Venetian masks (18th century)

Civil Process and Mediation in Italy, 2024

Ius Dicere et Litem Componere, Italiae Usus

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A summary

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Abstract - The rule of law is extremely important and the role and activities of the courts are absolutely relevant. But enforcing the law proves one right, another wrong, and does not solve the conflict. And in a society where, due to life-styles and work, family and social ties have become weaker and social relationships are increasingly conditioned by technological aspects, the judicial process, which is supposed to solve problems, has become a problem itself (too complicated and too long). In Italy, at the end of 2009, there were 5,826,440 pending cases in civil courts, the highest number ever reached. In 2010 the compulsory civil and commercial mediation was implemented in the contemporary legal system; contemporary, because mediation belongs to the Italian legal tradition. Fierce opposition by lawyers, benign neglect by judges. Over a period of about ten years mediation has grown, but not enough. And, above all, usually the parties are not present in the mediation meetings, but they are represented by their lawyers. This greatly undermines the effectiveness of the procedure. In 2021/2023 the Riforma Cartabia has introduced relevant new rules in the civil proceedings and in ADR. Will they be sufficient to reduce the backlog and, more relevant, the length of trials? How will the new civil trial rules and mediation procedures interact with each other? Risk: the lawyerization of mediation. How to avoid it? Through highly qualified training.

1.. Introduction

- December 31, 2009, 5,826,440 pending cases in Italian civil courts, the highest number ever reached.

Compulsory civil and commercial mediation was ruled in 2010 and came in force in 2011. Strong opposition by lawyers and benign neglect from judges. Two main criticisms:

- "*mediation is not justice*"! true, justice is *jus dicere* (enforcing the law, proves one right, another wrong, but does not solve the conflict), mediation is *litem componere* (settles the dispute);

- "*mediation does not belong to the Italian legal tradition*"; wrong, history teaches just the opposite!

2.. A Bit of History - VII century B.C. - Απαγορεύεται η έναρξη δικαστικής διαμάχης μεταξύ δύο προσώπων, εάν δεν έχει προηγηθεί προσπάθεια συμβιβασμού
"*It is forbidden to start a judgment between two if conciliation has not been attempted before*". In other words, mandatory mediation.

This was one of the rules in the first collection of written laws in the Western world, due to Zaleuco from Locri Epizefiri, in the south of Italy, along the Ionian Sea, at that time a colony of Greece.

V century B.C. Republic of Rome (the origin of the later Roman Empire). XII tables rules. There is a hint to conciliation: "*Rem ubi pacunt, orato. Ni pacunt, in comitio aut in foro ante meridiem caussam coiciunto*" "If the parties agree, the judge shall issue the sentence. If the parties do not agree, they shall set forth the main aspects of the matter in the forum or courtroom before noon".

Almost in the same period, VI-V century B.C. China, The Analects of Confucius 論語 [12: 13] The Master said: "*In hearing lawsuits, I am no better than anyone else. What we need is to have no lawsuits*"[2].

In the Roman Empire for some centuries there were the "*Defensores civitatum*", local, paternal magistracy, with limited civil and penal jurisdiction, the forerunners of the modern conciliators.

A not insignificant role in the settlement of disputes, outside the trial, was payed by the "*jus mercatorum*", (merchants' law), which took shape in territories of the Italian independent municipalities of the late Middle Age (XII/XIII century A.C.) and then, following the merchants, spread to many European countries. This legislation provided, in the case of non-compliance with covenants and insolvency, the "*bancum ruptum*" (bankruptcy), and very heavy economic, as well personal, penalties. Then, in several cities, more and more began to be granted the "*fida*", self-conduct: the failed fugitive or banished people could reenter the city, without being thrown into prison, for a limited period, in order to reach an agreement with his creditors.

In the XIV/XV centuries A.C. the Republic of Venice was one of the main mercantile and financial centers of the Mediterranean sea. It paid close attention to the settlement of commercial trades. If the merchants, in disagreement among them, did not reach an agreement, the *Sopraconsoli* (judges) were to ensure that "*toto suo posse de ponendo ipsum -debtor- in concordio cum suis creditoribus*"— the judges must do every effort that an agreement could be reached (judicial mediation?).

The basis of western law was laid in ancient Rome. Anyway, already in the XVI century A.C., in Italy, Francesco Guicciardini (2015), a relevant philosopher and politician in Florence, complained about the administration of justice by the courts.

The dislike of lawsuits by the Chinese population was alive in the XVI/XVII centuries A.C. Emperor Kangxi (1662/1722) is credited with the following statement: "Judicial disputes would incur in ordinate multiplication if the people were not afraid of the courts and trusted into find swift and perfect justice in them"[4].

A Chinese proverb well summarizes the concept: "*Better to starve that to be- come a thief; better to be tortured to death than to sue*".

Also in England "*Suffer any wrong that can be done you rather than come here, to the Court of Chancery!*", This was the Charles Dickens' conclusion in the novel Bleak House, published in 1852-1853.

USA—1906, Roscoe Pound's (dean of the University of Nebraska College of Law) report entitled "*The causes of popular Dissatisfaction with the Administration of Justice*", read at an American Bar Association conference.

Dispute resolution outside the courts was quite widespread in Europe. In the XVIII century in the Netherlands it was mandatory for citizens to go before conciliators, without the assistance of lawyers, before going to ordinary courts. This had been pointed out by Voltaire in a 1745 letter.

That seems to have been well known to the members of the Constituent Assembly, born out of the French revolution. These, wishing to affect a radical change in the judicial system, adopted the idea of a "paternal" judiciary, which could adjudicate small claims disputes without formality. And also seek to maintain peace and concord by preventing litigation. Thus in 1790, justices of peace were established, the figure of which was brough to Italy by the Napoleonic army and, over the years, proved itself especially in the Kingdom of the Two Sicilies (in the south of Italy).

All of this does not mean that the rule of law and the role of courts are not relevant.

Absolutely the contrary: the rule of law and tribunal activity are extremely important ("*There are still judges in Berlin*"!)[7]. (Franz Theodor Kugler,1856)

However, it is appropriate for there to be an integrated system of controversy solution, Sander, 1976, and this is what was decided to be done in Italy in 1865.

The newly established kingdom of Italy (1861) credited conciliation with no small relevance. In the first code of civil procedure, enacted in 1865, the preliminary title was called "*Della conciliazione e del compromesso*" ("Conciliation and consent") and its seven articles provided an absolutely up-to-date regula- tions (the enforceability of the conciliation minutes was also provided for). Royal Decree n. 2626 of 1865 established the conciliation judges, with two functions, Jurisdictional and conciliatory, the one, however, prevailing over the other. In 1880, 70% of the judgements issued in Italy came from conciliatory judges.

In the 1922/1945 period, fascism in power had centralized in the state as much as possible of the public functions, from the fire brigades to the Red Cross, as well as the management of the disputes. This was to be carried out only by the state judges, not by private mediators.

As a consequence, the ultra-decade-long-training of new recruits of legal practitioners. Since the '30s of the last century mediation has not been taught in the Italian universities. Therefore, mediation belongs to the Italian legal tradition, but we forgot it.

December 31, 2009, 5,826,440 pending cases in Italian civil courts, the highest number ever reached. Compulsory civil and commercial mediation was ruled in 2010 (in force from 2011) for disputes amounted to approximate the 8.5% of the Italian civil judicial disputes.

The judge could order mediation in disputes concerning ALL available rights.

The mediation agreement, omologated by the president of the court, was enforceable.

To become a mediator, the law prescribed an initial course of 50 hours (too few).

Strong opposition by lawyers (a matter of culture and ADR regarded as Alarming Drops in Revenues) and benign neglect from judges (a matter of culture: mediation as a child of a lesser God!).

2012, according to the Constitutional Court the D.L. 28/2010 was affected by over delegation. No more compulsory mediation, only *iussu iudicis* mandatory mediation remained in force. There was an increase in the use of the voluntary one.

D.L. 69/2023: mandatory mediation back again, compulsory legal assistance to the parties in the mediation proceeding and lawyers mediators *ope legis* (15 hours training required)!!! At the beginning of the mediation procedure, an initial information meeting was scheduled, after which the parties, assisted by lawyers, could decide whether to abandon or start (OPT-OUT) the procedure, no longer compulsory but voluntary. The mediation agreement, signed by the parties and the lawyers, was in itself enforceable. According to the new Article 185-bis, of the Civil Procedure Code, the judge could make a conciliatory proposal, if not accepted he could order a referral to a mediation proceeding (arb-then-med).

Step by step mediation continued on its way, with a major change: gradually judges realized the importance of mediation and lawyers, very slowly, began to follow.

In the 2011/2022 period there had been:

- a decrease (−5% per annum) in the number of procedures activated in civil courts, due to the economic crisis and the Covid pandemic;
- a strong increase (+14% per year) in civil and commercial mediation procedures;
- a sharp increase (+12% per year) of agreements reached in mediation.

And, according to the European Union, in 2016 Italy used mediation at a rate six times higher than the rest of Europe. BUT in 2022:

- the success rate (agreements/mediations activated) was 15%;
- the ratio agreements/new court proceedings 0.9%.

Too little. However the matters subject to compulsory mediation in the period 2011/2022 amounted to only 8.5 per cent of the disputes subject to civil court proceedings. With the Cartabia Reform (2021/2023) this percentage will rise to 20/25%.

- Nevertheless. In mediation procedures, where all parties were present up and decided to go beyond the first meeting, the success rate was 47%.

3. Court Civil Proceeding and ADR Reform in Italy - Why is it so difficult in Italy to get parties to be present in a mediation proceeding?

Two main reasons:

- the lack of training at university level (as mentioned above) and an initial training of mediators of only 50 hours;

- a cultural background: in Italy there was no the bourgeois nor the industrial revolution, but only the self-named "fascist revolution", which was nothing else but the maintenance of the status quo ante. Therefore, Italians are not particularly fond of novelty.

From 2009 to 2021 the backlog of civil cases in the courts had decreased, but not by a sufficient amount, while the duration of cases in courts was still too long. Therefore between 2021 and 2023 a sweeping reform of the civil process and ADR (mediation, arbitration and assisted negotiation) was implemented, rubricated under the name of the Cartabia Reform (named after the minister of justice in charge).

As far as civil process is concerned, according to the Italian Government, 2022, "*the reform focuses mainly on reducing the time of civil proceedings, identifying a wide range of interventions aimed at reducing the number of cases in judicial offices, simplifying existing procedures, reducing the backlog and increasing the productivity of the offices themselves. To contain the explosion of litigation in the judicial offices, the use of alternative instruments for the resolution of disputes, primarily arbitration and mediation, is accentuated, and the current system for quantifying and recovering judicial costs is under review*"[12].

The relevant changes of proceedings of first instance are among the most important one and, may be, the most relevant in connection with mediation.

Tight timeframes and many procedural tasks to be completed before and during the first hearing.

Also, according to the government, another essential element for growing the use of mediation is the attention to the relationship between magistrates and ADR. "*It is time to rethink the relationship between trial before the judge, and mediation tools, including giving the judge the opportunity to encourage the parties towards conciliatory solutions, especially through the provision of reward measures*". And this is a focal point.

Between 2021 and 2022, the rules, called "*Cartabia Reform*", named after the minister in charge, were enacted.

The main novelties.
A - increase in the number of matters subject to mediation

B - greater effectiveness of the procedure, through procedural consequences and tax incentives

C - increased fees to be paid to mediation bodies

D - greater involvement of the judiciary

E - involvement of the public administration

F - increase of the quality requirements of mediation bodies, trainers and mediators; sanctions;

G - regulation of the use of the technical consultant's report in mediation H—telematic mediation

I - opposition to injunction

L - increased training period

Another relevant reform, the digitizion of the civil process and increased focus on ODR.

On my opinion, particularly relevant to the proper development of mediation are the issues under B, D and, overall, L.

4. Likely Interactions between the Civil Process and ADR New Rules - When compulsory mediation was ruled judges looked at mediation with a "benign neglect", but since 2015 it is thanks to the judiciary that the use of mediation has been increasing in Italy: mediation proceedings delegated by judges were 3% (of all incoming mediation procedures) in 2012, 8% in 2014, 11% in 2016, 14% in 2018, 12% in 2020, 16% in 2022.

The Italian judges con order the litigants to undergo a mediation (delegated mediation) (ex art. 5, c.2, D.Lgs. 28/2010) or/and make a solution proposal based on equity (ex art. 185-bis civil procedure code), which the parties are free to accept or refuse (not binding arbitration), in all subjects related to alienable civil rights. If the proposal is not accepted, the judge can order a referral to a mediation procedure, managed by an external mediation provider (arb-then-med).

A very effective summary of the likely interactions (or, de-interactions!) between new civil trial rules and new ADR norms are in a paper by former judge Massimo Moriconi, one of the leading pioneer in the use and analysis of mediation in his work in court in Italy:

"*The Cartabia Reform set questions about the ADR/ASR tools and, mainly, about mediation.*

"*Will it benefit them? And if so, which mediation in particular? All of them without distinction, from voluntary to compulsory mediation, to court mandated to statutory mediation? Or instead to varying degrees? And if so, why?*

"*Will it be appropriate or necessary for mediation providers to refocus, based on the regulations and opportunities?*

"*And if so, how should providers and mediators do so? Is the reform likely to transform the generally unfriendly attitude toward mediation among judges for the better?*

"*Negative indicators in this regard could be the exponential development and success of the judge's proposal under Article 185 bis, civil procedure code; the tight civil judgements timelines introduced by the Reform and the possible conflict with the mandatory calendar; and, perhaps among the most serious, the continued lack of understanding by the judiciary of the usefulness of mediation.*

"*Given the tight timelines of the procedural tasks involved in the first instance of the trial, and in particular the significance that the trial calendar is taking on, and the atmosphere of disvalue against any act that dilutes the trial time, one has also to wonder where and when the judge can enter conciliatory paths without facing violations that should even susceptible him or her negative measures in terms of discipline and career?*"

Tight timeframes and many procedural tasks are to be completed before and during the first hearing.

An example of the difficulties in reconciling the new procedural rules with the new ADR rules can be taken from the following decrees. Court of Modena—second civil section—Decree 11.05.2023 and Court of Verona—first civil section—24.11.2023

5. Conclusion - Mediation belongs to the Italian legal culture, but it has not been taught in the universities for almost one century. Therefore the contemporary jurists, judges and lawyers, have been trained in adversarial techniques, which have been used for decades. It is obvious that, at the introduction (2010) of mandatory civil mediation, very few professionals understood its essence and usefulness.

The 1°CIM, Italian mediation competition (2013), wanted and organized by Dr. Nicola Giudice, Milan Chamber of Commerce, repeated every year so far and also replicated in other cities, raised the enthusiastic interest of many university students. Some university teachers have also activated ADR courses. But the Ministry of the University still has not decided to set up a curricular course on ADR!!!

Habit is very hard to die. The most relevant problem I see on the horizon is the lawyerization of mediation in Italy, as happened in other countries. How to avoid it? Through qualified training, even at the international level.

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