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Italy

Mediation in Italy: the legislative debate and the future

Giuseppe De Palo, Paola Bernadini and **Luigi Cominelli**

An overview of justice administration in Italy shows a situation on the verge of collapse. The traditional rigidity of European bureaucratic organisations, combined with judicial ritualism and defence of the *status quo* by strong guilds of lawyers and judges, has made the whole system of dispute processing intolerably long and cumbersome. In fact, the average duration of a civil case before a trial court has recently reached the peak of 1,300 days (that is over three and a half years), while the average criminal proceeding lasts 427 days (1.16 years) before the court of first instance and 555 days (1.52 years) before the court of appeal. In short, litigants planning to appeal a first instance decision in a civil case can reasonably estimate that the time needed to reach a final judgment is approximately 10 years.

This appalling situation has spurred members of parliament to seek to introduce numerous mediation laws.[1] However, only a few of these proposals have become statutes; the majority have not progressed beyond bills. Perhaps, given the popular tendency to view the courts as the preferred avenue for dealing with disputes, anything that threaten the sacredness and inviolability of this jurisdiction is unconsciously considered taboo.[2]

Recent mediation laws

In 1991 the parliament created a new judicial office, the Judge of the Peace (Giudice di Pace). While performing traditional juridical functions over small claims only, the new judges were also empowered to mediate civil disputes regardless of the amount in dispute, on the request of one of the parties. Although only 10 per cent of its judgments are currently appealed, suggesting the institution's efficacy, the competence of the Judges of the Peace is almost unknown to individuals and business — apart from a few districts where a group of judges has taken the initiative of promoting and advertising this forum.

In 1993 parliament passed Law No 580 allowing local Chambers of Commerce to establish mediation services for the amicable resolution of disputes. Since then, conciliation offices have been set up by more than 100 Chambers of Commerce throughout Italy. However, almost none to date have generated any mediation business aside from low-value, business-to-consumer disputes. This was probably due to the fact that, despite the legislative mandate, the Chambers of Commerce have been unable to promote mediation throughout Italy. In fact, almost a decade after the enactment of Law No 580, a survey published in 2001 by the Italian Institute for Foreign Trade showed that as many as 98 per cent of Italy's export companies had never heard of mediation.[3] Again in 2001, a study by the Italian National Institute of Statistics (ISTAT) on ADR reported that only four per cent of Italian people were aware that the Chambers of Commerce offered a mediation service.

Two 1998 statutes, summarised in Table 1 below, again assigned to the Chambers of Commerce the task of providing mediation services for certain types of dispute. However, these have also resulted in mediation levels well below expectations.

Finally, while discussion in parliament is currently moving forward on a very progressive mediation bill for all civil disputes,[4] in early January 2003 the Government passed a number of laws implementing the long awaited, and hotly debated, reform of company law. One of these laws, No 5 of 2003, regulates mediation of company disputes in a manner most commentators agree is likely to make mediation fail in this field.

Consistent with previous proposals to regulate mediation, Law No 5 of 2003 (which becomes effective as of 1 January 2004) tries to promote mediation in corporate and financial matters. The new rules establish a national register of mediation organisations, both public and private, kept by the Ministry of Justice. Mediated settlements reached with the assistance of registered organisations enjoy some benefits absent in private mediation: the settlement is judicially enforceable and the mediation

Table 1: Recent Mediation Laws

Law No 374 (1991)	Establishes the possibility of optional mediation before a 'Judge of the Peace'. In 1998, out of 380,710 cases brought before the 'Judges of the Peace', 310,676 were settled.
Law No 580 (1993)	Grants the Chambers of Commerce the power to create a mediation service for the resolution of disputes between business and consumers.
Law No 192 (1998)	Mandates pre-trial mediation at the local Chamber of Commerce for disputes that pertain to sub-contracting agreements (as defined in the law).
Law No 281 (1998)	Offers certain consumer associations the option of initiating voluntary mediation with a business before a Chamber of Commerce.
Law No 5 (2003)	See text at right.

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Table 2: Bill 2463 – Synoptic Chart

Definition of 'mediation' (art 2)	Procedure where a third, neutral party (other than the assigned judge) facilitates communication and negotiations between litigants to help them find a consensual solution via an agreement.
Mediation principles and rules (arts 3, 5 and 6)	Flexibility, confidentiality, non-adjudication
Public mediation entities (arts 9, 10 and 11)	1. Court Mediation Office 2. Chambers of Commerce Mediation Office Deal with 'minor' cases between companies and consumers: that is with cases that do not exceed 25,000 Euro.
Private mediation organisations (arts 7 and 8)	Limited liability companies (50 per cent share capital owned by lawyers, attorneys, CPAs and other professionals) registered with the Ministry of Justice.
Mediation training (art 6)	Mediators belonging to the private and public sector must have respectively attended a 40 and 30 hour training program, plus 10 and 3 mediation sessions.
Public mediation procedure (art 11)	If parties do not reach an agreement, they must record in writing their respective reasons and positions, for judicial consideration in case of trial. Judicial decisions regarding costs may depend on such records.
Private mediation procedure (art 8)	Decided and approved by the parties involved.
Mediation agreement (arts 12, 13)	Immediately enforceable in the case of public mediation organisations. Enforceable with court approval after formal scrutiny for private mediation organisations.
Informational duty (art 14)	Lawyers must inform their clients about the mediation option; if they refuse, the client must explain why they have decided not to refer the matter to mediation.
Mediation proposed by judge (art 15)	The assigned judge may suggest the parties resort to registered mediation organisations (either public or private).

Table 3: Previous Bills

Bill No 7185 (7 July 2000)	Proposes to promote and regulate voluntary mediation by establishing: (1) courts' mediation chambers (to be conducted by lawyers/mediators); (2) tax deductions for mediation providers and users; (3) a duty, for both lawyer and client, to consider the settlement option before initiating litigation; (4) mandatory mediation training. It also proposed to foster the mediation role of the Judges of the Peace.
Bill No 302 (30 May 2001)	Provides financial support for social and criminal mediation projects established autonomously by local governments.
Bill No 541 (6 June 2001)	Introduces compulsory non-judicial mediation for certain types of dispute (mostly car accidents) not exceeding the average value of 25,000 Euro. Proposes to establish a mediation chamber in every court, for a voluntary mediation attempt in civil or commercial cases. Regulates the activities of private, or public, mediation providers and states that decisions reached through private ADR providers be subject to public or judicial scrutiny, in order to become effective.
Bill No 894 (19 June 2001)	Proposes to regulate criminal mediation, stating that only publicly registered mediators may mediate criminal proceedings.

proceeding is free from stamp duty. Moreover, if mediation is provided for by a contract clause or by company by-laws, the judge will order a stay of the proceedings should the litigants side-step mediation.

A significant problem with Law No 5 of 2003 arises from article 40 which mandates an 'evaluative' mediation process. In fact, pursuant to art 40, if the parties are unable to agree, the mediator must propose a final settlement in a post-mediation report attesting the failure of mediation. Furthermore, article 40 continues, the parties must take 'a definitive position' in respect of the mediator's final proposal, declaring what they would instead be willing to offer and accept. These party declarations, which must also be included in the post-mediation report, can then be used by the judge in any ensuing legal proceedings for costs.

Recent mediation bills

One of the most recent mediation bills (Bill No 2463), if approved, would apply to all civil and commercial disputes not covered by Law No 5 of 2003, and would give enormous impetus to the practice of mediation. The bill draws extensively from foreign legal and authoritative texts such as the US Uniform Mediation Act (especially regarding the definitions of mediation and confidentiality) and the CPR-Georgetown Principles applicable to ADR providers. The most salient features of Bill 2463 are summarised in Table 2.

As the reader will notice, apart frm the direct influence of the US laws mentioned above, Bill 2463 draws extensively from earlier mediation bills, whose key features are listed in Table 3.

Critique

The attention paid by Italian legislators to ADR is a good sign, at least in so far as it demonstrates the public's demand that the crisis in our judicial system be dealt with. However, past and present legislative interventions have tended to (1) overlook the *qualitative* benefits of ADR and (2) to 'jeopardise the flexibility and simplicity of ADR'.[5]

In response to point (1), that is, the legislators' tendency to conceive of

mediation merely as an instrument for coping with the litigation crisis, suffice it to say that even if our judicial system were to function properly, the qualitative benefits of ADR (that is, the promotion of interest-based relationships) would still be needed.

Regarding point (2), it is important to note that prescriptive laws (such as Law No 5 of 2003 and Law No 192 of 1998) tend to limit the confidentiality principle (by forcing the mediator to evaluate and the judge to eventually award costs on the basis of these evaluation records) and the voluntary nature of mediation (by making pre-trial mediation mandatory). In this way, the parliament may in the first case end up discouraging parties from referring to mediation and, in the second, undermine mediation's immediate and long lasting success.

As an example, there is evidence that the initiative of the Turin city council regarding the introduction of prior compulsory mediation in certain labor disputes resulted in the reduction of the total number of settlements, compared with the period when pre-trail mediation was voluntary.[6] The experiment that took place in Turin demonstrated that the body put in charge of these mediations was unable to cope with the large number of cases it had received, so that even cases that had a real chance to settle could not be paid that minimal amount of time and attention necessary for the success of mediation.

According to some scholars and to the European Commission, legislators should aim to establish a 'soft' framework aiming at guaranteeing the neutrality and competence of mediators and equality of treatment between the parties.[7] Furthermore, any ADR reform should be implemented with adequate financial means to produce the desired results.

The idea of promoting mediation by regulating it is flawed. Despite popular calls for more legislative regulation, in our view the three key factors needed to produce a sustainable ADR environment are education, regulation and practice. When these three factors, whose weight is at the moment disproportioned, reach the necessary equilibrium, ADR will flourish in a country that, in many other realms, has a flair for creativity. ●

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Endnotes

1. S Chiarloni 'Stato attuale e prospettive della conciliazione stragiudiziale' (2000) 2 *Rivista trimestrale di diritto e procedura civile* 452.
2. The judicial function and jurisdiction are not perceived as a public service, but tend to be identified as pure power: T Massa, G Bisogni 'L'accesso alla giustizia e i mezzi di risoluzione alternativa delle controversie' (2000) 5 *Documenti Giustizia* 807.
3. G De Palo, L D'Urso, *Incentivare il commercio con l'estero riducendo il rischio di contenzioso internazionale*, (Milano: Il Sole 24 Ore, 2001).
4. Bill 2463, summarised in Table 2.
5. European Commission, Green paper on alternative dispute resolution in civil and commercial law, 19/04/2002, COM (2002)\196, § 92.
6. S Chiarloni 'Stato attuale e prospettive della conciliazione stragiudiziale' (2000) 2 *Rivista trimstrale di diritto e procedura civile* 462.
7. S Chiarloni 'Stato attuale e prospettive della conciliazione stragiudiziale' (2000) 2 *Rivista trimstrale di diritto e procedura civile* 460.

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