Facing the Crisis: New Italian Provisions to keep Disputes out of the Courtroom (or take them out of it)

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1. Introduction

 Apparently, every jurisdiction is faced with the problem of reducing the courtrooms’ caseload in order to grant more effective and more efficient judicial relief. This is an extremely hard task to perform, especially in times of economic crisis, when budgets have to be cut and the financial situation does not allow hiring more judges.

 Among the solutions offered to achieve this aim, in the last few decades, A.D.R. have been widely used worldwide, inter alia, to solve disputes before they are brought before the judge.

 It is usually recognised that A.D.R. are more effectively used in systems where judicial adjudication performs well. In other words, to consider A.D.R. mainly as a way to avoid further congestion of inefficient and very slow courts does not lead to satisfactory results. Actually, prospective litigants will be more encouraged to find an amicable solution where the alternative would be risking one’s day in a fast and efficient court. Where courts are slow in adjudicating cases, on the other hand, at least one of the parties (usually the one that foresees a negative outcome of the dispute) will be reluctant to find an early solution, and more willing to let the case get old in the mire of a congested judicial system.

 It is no secret that the Italian judicial system has been for many years in crisis. For reasons which is beyond the scope of this paper to analyse, Italian civil justice appears unable to dispatch cases in a speedy and efficient way and this has led to a rather critical position in the face not only of the domestic public but also of the international community at large.
Since the early ’90s ¹, the Italian lawmaker has attempted to find solutions to this problem. Its approach has mostly been a normative one, through waves of periodical and mostly uncoordinated reforms which modified existing rules and introduced new ones in the code of civil procedure and in other pieces of procedural legislation.

Apparently, this great effort of making new provisions and redrafting old ones has and is being made on the assumption that the goals of increasing judicial efficiency and making proceedings faster could be achieved simply by changing procedural rules. In the author’s opinion, this is simply a non sequitur, which is tantamount to trying to empty an ocean with a bucket.

Every commentator seems to be aware of this: nonetheless, this common opinion has so far not brought a change in the course of action of the Italian lawmaker, which, as late as mid-2014, brought forth another reform in matters of civil procedure, and even by way of decreto legge (i.e., emergency legislation first approved by the Government and then ratified by the Parliament).²

In recent years, however, along with these rather ineffective changes in the rules governing judicial proceedings, the Italian lawmaker started operating also at a different level, introducing various forms of A.D.R. as a pre-requisite to the bringing of new cases before the courts.

The idea behind this line of reforms is rather obvious: if litigants are compelled to at least try to mediate their dispute beforehand, they may actually come up with a settlement, thus avoiding going to court altogether. In other words, A.D.R. have been (and are) seen mostly as a device to disincentive judicial litigation by introducing one more mandatory step in the course of proceedings. The lawmaker’s gamble is that less cases will actually enter the courtroom and that, as a by-product, judges will have more time to dedicate to the dispatching of cases already pending before them.

2. Mandatory mediation under decreto n. 28 of 2010

The first experiment in order to implement this policy was made with decreto legislativo n. 28 of 4 March 2010.³

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¹ For an introduction to the numerous procedural reforms of the last 25 years in Italy, reference may be made to M. A. Lupoi, Civil procedure in Italy, II ed., Alphen aan den Rijn, 2014, p. 29 ff.

² On the Constitutional dynamics of a decreto legge, see M. A. Lupoi, Civil procedure in Italy, cit., p. 17.

Actually, at the time, Italy was under the duty to implement in national legislation the principles set forth by the European Directive n. 52 of 21 May 2008, on certain aspects of mediation in civil and commercial matters. The Italian lawmaker, however, raised to the occasion and, while doing so, drafted a general regulation of mediation in civil and commercial matters for the Italian legal system.

Of particular interest for us here was art. 5 of *decreto* n. 28, which imposed on prospective litigants a mandatory preliminary attempt to mediate the case before bringing it in front of a judge. This mandatory attempt was required in disputes concerning rights *in rem*, division of common properties, car accidents, wills and successions, family agreements (*patti di famiglia*), lease contracts, free-loan contracts, medical liability, libel, insurance, banking, financial contracts, condominium disputes.

The basic idea behind this new provision was that a plaintiff, before being entitled to serve his or her originating claim, should file an application with one of the mediation centres approved by the Ministry of Justice to try to mediate the case. If such preliminary mandatory mediation was not duly attempted, at the first hearing, either upon the defendant’s objection or even *ex officio*, the judge should have remanded the parties to mediation, fixing the following hearing after a delay of four months.

Serious doubts were originally cast, however, as to the compatibility of some of the provisions of *decreto legislativo* n. 28 of 2010 with the Italian Constitution, in particular concerning the costs of the mediation proceedings. In general, practitioners expressed a very strong opposition against mandatory mediation, basically arguing that it violated the plaintiff’s Constitutional right of action.

As a matter of fact, the Italian Constitutional Court, with its decision of 6 December 2012, n. 272 declared art. 5(1) and several other connected provisions of *decreto* n. 28 unconstitutional, claiming that, by introducing mandatory mediation, the Government had gone beyond the boundaries set to its normative intervention by Article 60 of Law No. 69 of 2009 (the *legge delega*). 4

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4 Basically, the Constitutional Court argued that neither the European directive nor the *legge delega* empowered the Government (as delegated lawmaker) to provide for mandatory mediation for certain types of disputes. On the Constitutional mechanisms concerning a *decreto legislativo* from the Government, and its relation to a previous *legge delega* drafted by Parliament see M. A. Lupoi, *Civil procedure in Italy*, cit., p. 18.
At this point, the fate of mediation in Italy appeared to be sealed: in the following months the number of proceedings started before mediation centres dramatically dropped, clearly showing that, without an obligation to do so, Italian litigants would not voluntarily try to mediate their dispute.

However, just a few months later, the Government, in order to by-pass the outcome of the Court’s decision, issued the decreto legge n. 69 of 21 June 2013, implemented by Law No. 98 of 2013, which re-introduced mandatory mediation, with some relevant modifications vis à vis the first version of this ADR device.

In particular, a new Article 5(1bis) was inserted into decreto n. 28 of 2010, basically reproducing its original art. 5(1) (see supra), which the Constitutional Court had declared unconstitutional on formal (and not substantial) grounds.5

A few changes, however, were brought, in order to overcome Constitutional difficulties and to win lawyers’ opposition to mandatory mediation; according to the revised version of Articles 5 and 8 of decreto n. 28, therefore, today it is still mandatory to try and mediate certain types of disputes, but what the parties are supposed to do before filing a claim in court is only to participate at least in an informative conference with a mediator. At the end of such conference, the parties may either decide to go through with the mediation or to be done with it and proceed before the court. If such is the case, only a nominal fee will have to be paid.

In other words, today, at least “on paper”, the preliminary condition to starting court proceedings can be satisfied quite quickly and inexpensively. Of course, the lawmaker’s challenge is for as many prospective litigants as possible to be persuaded by the mediator to try and mediate their dispute. It must also be noted that some courts are showing a restrictive approach to the new provision of Art. 5(1bis), going beyond its wording and claiming that, in order for the procedural precondition to be met, it is not enough to simply attend the first conference before the mediator but rather to seriously attempt mediating the dispute.

Moreover, the maximum legal duration of mediation proceedings has been reduced (from four to three months) and road accidents cases are no longer subject to preliminary mandatory mediation.

3. Court imposed mediation

Decreto legislativo n. 28 of 2010, along with mandatory mediation, which aims at keeping cases out of court, also introduced another important form of mediation: i.e. judge-proposed (and, since 2013, imposed) mediation, in order to try and take pending cases out of the courtroom and into the rooms of mediation centres.

The original version of art. 5(2) of decreto n. 28 of 2010, as a matter of fact, enabled the judge to propose to the parties, at any stage of the proceedings, to try and settle their dispute before a mediator.

5 See also M. Bove, L’accordo conciliativo rivisitato dal c.d. ›decreto del fare‹, in www.judicium.it, p. 1; F. Cuomo Ulloa, La nuova mediazione. Profili applicative, Bologna, 2013.
After the revision of 2013 (see above), however, in order to make this A.D.R. device more effective, Article 5(2) was redrafted so that the judge is empowered, at any stage of the proceedings (and even at the appeal level), to refer the parties to a mediation centre to try and conciliate the dispute, even without the parties’ consent.

When such a referral takes place, in the original dispute the judge fixes a further hearing with a delay of at least three months, in order to check whether the parties did indeed appear before a mediator and if a settlement was thus reached. If the parties, however, fail to comply to the judge’s order, the case will be struck out with no decision on the merits.

Practice is showing that some judges apply this form of mediation quite extensively.

4. The effects of mediation in Italy: the story so far

The results of the introduction of compulsory and judge-imposed mediation on the judicial system are the object of controversy among commentators, divided among critics and fans of these new A.D.R. schemes.

The latest data available show a strong increase in the number of mediations held in Italy. In particular, in 2014, there were almost as many mediations taking place (179.587) as new proceedings started (195.273) concerning disputes where mediation is compulsory according to Art. 5 bis of decreto n. 28 of 2010.

These numbers, however, need to be interpreted.

Many mediation proceedings simply end with the respondent never showing up before the mediator or showing up just to say that he has no interest in trying to mediate (in 2014, almost 60% of cases). In the remaining percentage of cases where the respondent does show up and agrees on giving mediation a chance, the success rate is very high (almost 50%). In other words, when parties seriously try to mediate their dispute, it is likely that they will agree on a settlement.

In rough numbers, however, so far, this has not yet led to a meaningful reduction of new cases going to court.

In fact, while mediation appears to be slowly gaining ground in the culture of prospective litigants in Italy today, it still has not fulfilled the legislator’s aim of emptying the courtrooms.

5. Decreto n. 132 of 2014 and “degiurisdizionalizzazione”

With its primary objective of reducing the courts’ caseload and thus making proceedings faster still far from being reached, the Italian lawmaker, in 2014, deemed it necessary to find new ways to encourage litigants from going to court (or, looking at it from a different standpoint, to make it harder for them to find the courtroom’s open).

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6 Data show that mediation is most successful when it is voluntary; mandatory mediation is far less effective (21.4%) and judge-imposed mediation shows the lowest success rate (15%).
On 12 September 2014, decreto legge n. 132 was thus approved by the Government, to bring “Urgent measures of “degiurisdizionalizzazione” and other interventions for dispatching backlog in matters of civil justice”. 7

It has to be remarked that, in Italian constitutional law, the Government should enact decreti-legge only in very urgent cases, when the usual legislative procedure before the two chambers of Parliament would be too time wasting for an effective intervention. This was not obviously the case with regard to decreto n. 132, whose provisions, rather weirdly, were not even designed to be immediately operative (most of them, actually, were supposed to enter into force only after the publication of the law enacting the decreto-legge). It is thus apparent that the Government recurred to decreto-legge just in order to cut-short Parliament times (and possibly parliamentary opposition...), in a rather unconventional use of the instrument provided for by Art. 77 of the Italian Constitution.

The new decreto legge, later converted into law n. 164 of 10 November 20148, contains several provisions dealing with various aspects of civil procedure (from arbitration to matrimonial proceedings to the enforcement of claims). In this article, however, I will only deal with those rules that aim at solving disputes outside of courtrooms.

As a matter of fact, in this statute, a new catchword was invented by the lawmaker: degiurisdizionalizzazione, which has no obvious equivalent in English and which may be roughly translated as a process towards un-jurisdictional solutions of disputes. Should we want to invent a new English word, we could use the term “dejurisdictionalization”.

One could argue that nothing new was invented, since the essence of A.D.R. has always been to solve disputes without the intervention of a jurisdictional authority. And one also could remark that it is a well-known merchandising technique to sell old products under brand new names when there’s a shortage of new ideas. In this case, however, something new was undoubtedly brought into the Italian legal system as a whole.

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8 See C. Consolo, E’ legge (con poche modifiche) il d.l. sulla “degiurisdizionalizzazione” arbitral-conciliativa, sulle passerelle processuali, sulla grinta esecutiva, in Giust. civ., 2014, p. 1061.
Actually, for the first time, the lawmaker decided to let lawyers play a more active role in the solution of disputes, enabling them to negotiate cases and come up with settlements having full enforcing authority, with no need of a judicial exequatur. This might not sound like the invention of the wheel for foreign observers, but it must be remarked that, until decreto n. 132 of 2014, though lawyers could of course negotiate disputes for their clients, the relevant settlement, even if legally binding for the parties, could not be used as an enforcement title (titolo esecutivo) without previously referring to the court to have a (summary) decision rendered on that settlement or, since 2005, having their clients signatures verified by a notary public or another public official.

Since 2014, then, the role of practitioners in the Italian system of civil justice has changed. No longer just the partisan defenders of parties both in and out of court, they are now an integral part of the system for the solution of disputes, with new “public” powers as concerns the authentication of their clients’ signatures and the control over the conformity of the latter’s agreements with mandatory provisions and public order.

From this point of view, the most relevant innovation, in a systematic perspective, arguably concerns matrimonial and parental disputes: in this area of the law, traditionally, disputes could be solved in a binding way only by a judge. As a matter of fact, courts had a monopoly over separation and divorce decisions, in the sense that spouses could decide to no longer live together but they were doomed to be legally married until a judicial decision officially declared the dissolution of their conjugal tie. From 2014, this is no longer true, as it will be analysed in paragraph 9.

The new statute was greeted by (institutional) statements putting an emphasis on the new role granted to lawyers and on the big new challenge they now face. More realistically, the lawmaker could have played a trick on lawyers, who might not be able to take advantage of the new role handed over to them and simply let the new remedies fail. But if degiurisdizionalizzazione fails, lawyers’ credibility as partners in the smooth administration of civil justice will suffer a very serious blow, which may lead the lawmaker to steer the reforms wheels in favour of other actors on the playing field.

Decreto n. 132 of 2014 tackles the problem of courtroom’s congestion from two standpoints. On the one hand, the idea that parties should be compelled to try some form of A.D.R. before trying their case in court, which led to the introduction of mandatory mediation (see above) has been further implemented, with the introduction of negoziazione assistita as a preliminary procedural mandatory step in many civil cases. On the other hand, an attempt has also been made at finding a way to actually take cases already pending out of the courtroom to be decided by arbitration: a completely new device for the Italian procedural system which might recall court-annexed arbitration but which is really something different.9

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9 A. Briguglio, Nuovi ritocchi, cit., p. 8.
6. Referring judicial cases to arbitration

Art. 1. of decreto n. 132 deals with the transfer to arbitration of civil proceedings pending before judicial authorities. Basically, in civil cases concerning rights of which the parties may freely dispose of, apart from labour and public security disputes, pending before the Tribunale at first instance or the Court of Appeal at the time of entry into force of the new provision, the parties may jointly apply to hand over the power to adjudicate the case to arbitrators, under the provisions of the code of civil procedure. An exception is made for tort or monetary disputes for a value of 50.000,00 € or less in which a public administration is involved: as a matter of fact, the latter’s consent to remitting the dispute to arbitration is presumed, unless it expresses its written dissent within 30 days of receiving the other party’s request: in other words, a public administration may be bound to bring the case to arbitration as a consequence of its silence (or more likely its inefficiency…) in the face of a remittal request from its counterpart.

When such a joint request is handed to the judge, according to para. 2 of art. 1 of decreto n. 132, the latter, after checking that the requirements for the application of the provision are complied with, will transfer the case to the President of the local Bar Association (Consiglio dell’Ordine) who, in turn, will appoint an arbitral panel of 3 arbitrators for cases of a value of at least 100.000,00 € or of a single arbitrator, when both parties so decide, for cases of a lesser value. Some commentators, however, believe that the President of the Bar Association should be involved only when the parties have not agreed on whom to appoint as arbitrator in the first place. However, the (indeed questionable) rational of the new remedy appears to favour the creation of a necessary a connection between the court and local lawyers, so the first interpretation appears to be the most correct one.

Actually, the President of the Bar Association is bound to appoint as arbitrators lawyers which have been registered in the local Bar for at least 5 years and who have previously given their consent to such an appointment: this monopoly of lawyers in court-derived arbitration has been rightly criticised. According to para. 5bis of art. 1, the Ministry of Justice is supposed to establish criteria for the appointment of arbitrators in this context, taking into consideration,

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11 A. Briguglio, Nuovi ritocchi, cit., p. 9.
12 A. Briguglio, Nuovi ritocchi, cit., p. 10. Anche V. Vigoriti, Il “trasferimento” in arbitrato, cit., p. 7.
13 V. Vigoriti, Il “trasferimento” in arbitrato, cit., p. 7.
in particular, the arbitrator’s professional expertise \textit{vis à vis} the subject matter of the dispute and a rotation principle in the assignments of such appointments.

After the appointment of the arbitrator(s), the case proceeds before them. Para. 3 of art. 1 makes it clear that this is not a fresh arbitral proceeding but a continuation of the original judicial dispute: as a matter of fact, both the substantial and procedural effects of the initiating judicial petition are preserved, and the deadlines expired before the judge may not be reopened before the arbitrators. This is a major difference \textit{vis à vis} “ordinary” arbitration proceedings, where the parties activities are not bound by procedural time limits.

The arbitral award is expressly granted the same effects of a judgment, thus making it clear that this is what, under Italian law, would be called an arbitration “rituale”\textsuperscript{14}.

The law does not clarify what happens to the judicial proceedings when a case pending before the Tribunale at first instance is referred to arbitration under Art. 1 of decreto n. 132: apparently, such referral is definitive, and judicial proceedings are struck out with no decision on the merits.\textsuperscript{15} This implies that should arbitrators never come up with an award, the dispute will have to be started anew with no possibility to simply reinstate it before the original judge.\textsuperscript{16}

This is not necessarily the case at the appeal level: as para. 4 of Art. 1 makes clear, when an appeal dispute is referred to arbitration and the arbitrators do not render their award within 120 days of the formation of the arbitral panel, the case has to be reinstated within 60 days before the Court of appeal from which it was first transferred.\textsuperscript{17} At this point, the award may no longer be granted. However, if the deadline expires and the proceeding is not reinstated before the Court of appeal, the case is struck out.

The new provision takes into consideration the higher costs of arbitration as compared to those of judicial proceedings and, in order to encourage the application of this new method to solve a dispute, establishes that the Ministry of Justice will operate, for this context, a reduction of the ordinary criteria to determine an arbitrator’s reward.

Commentators have written a lot about this new provision, which appears to have many problematic implications, in particular as concerns the relation between the different phases in which proceedings could now develop, especially at the appeal level. In fact, the possibility for arbitrators to review a judicial decision of first instance and possibly change it with their award is a completely new procedural option that breaks the traditional view of the relations between judges and arbitrators. Until

\textsuperscript{14} See M. A. Lupoi, \textit{Civil procedure in Italy}, cit. p. 247.

\textsuperscript{15} A. Briguglio, \textit{Nuovi ritocchi}, cit., p. 11.

\textsuperscript{16} A. Briguglio, \textit{Nuovi ritocchi}, cit., p. 11.

\textsuperscript{17} D’Agosto, Criscuolo, \textit{Prime note sulle “misure urgenti di degiurisdizionalizzazione e altri interventi per la definizione dell’arretrato in materia di processo civile”}, in www.ilcaso.it, p. 9.
2014, such relation was one-directional, in the sense that only judges could review, under the conditions set by Art. 829 c.p.c., an arbitral award. Now, such relation has become bi-directional.

My opinion, however, is that this new type of “de-jurisdictionalised” A.D.R. will get more attention by academics for its systematic implications than by lawyers for its practical utility. In other words, one has to fear that this referral of judicial disputes before arbitrators will be written about more than used in practice.

As a matter of fact, the basic question which art. 1 leads to pose is why should parties who are already involved in judicial proceedings agree to bring the dispute before arbitrators? And why should they do it following the strict requirements of the new provision and not by simply abandoning judicial proceedings and start an arbitration anew?

It has to be considered that arbitration, even with the new tariffs set by the Ministry of justice, is more expensive than a judicial trial, in Italy and elsewhere. Moreover, one of the parties will usually have no interest in accelerating the dispatching of the case by removing it from the slow judicial trail to bring it on the faster arbitration highway.

Even more doubts arise when one considers the option to refer to arbitration a case which has already reached the Court of appeal. The main attraction of this option is the possibility to shorten the exceedingly long time which Italian Courts of second instance take to dispatch a case (usually 4\5 years). However, the party that won at first instance will be rather reluctant to move away from the court and enter the realm of arbitration, considering that arbitrators may pay less deference to the first instance decision than another judge would.

Such a procedural option, however, appears to be attractive when all the parties are dissatisfied with the first instance decision and the dispute has a very technical or specialised nature, in so far as all the parties may want to have the case reviewed within a shorter delay by an highly specialized panel of “private adjudicators”.

So far, no statistics are available but this writer’s feeling is that very few disputes, if any, have yet been moved to arbitration under art. 1 of decreto n. 132.

7. Assisted negotiation: scope and function

The other new form of “dejurisdictionalised” A.D.R. introduced by decreto legge n. 132 is a more traditional one. It is called “negoziazione assistita” (assisted negotiation) and it basically consists of formalized negotiations between the parties and their lawyers to settle their dispute before going to court (or, one may add, in order to bring a pending judicial dispute to a settled end).

One could wonder if the Italian lawmaker has not, as we say, discovered “hot water”, after all. Actually, negotiating settlements is what lawyers have been doing every day for centuries. What was the point of introducing this “assisted negotiation” then?
There are at least two answers to this question: from an institutional point of view, it has to be remarked that when parties settle by way of a negoziazione assistita, their agreement is granted full authoritative effects, as concerns the enforcement of the obligations taken in such agreement. In other words, parties are encouraged to use this new A.D.R. so that when a settlement is agreed upon but the other party fails to respect it, it will be possible to enforce it directly, without previously obtaining a judgment on the agreement. The practical answer, however, is that the lawmaker, after the upheaval among lawyers caused by the introduction of mandatory preliminary mediation in 2010, wanted to bring a new preliminary barrier to the introduction of a judicial claim which involved lawyers as active characters of such mechanism. Ditto: mandatory assisted negotiation with the support of one lawyer per party as a preliminary procedural step to be taken before being able to bring litigation in many civil cases.

This new “condizione di procedibilità” (i.e., a preliminary procedural requirement which has to be satisfied before proceedings may continue) was introduced by Art. 3 of decreto n. 132 in relation to any dispute concerning damages deriving from the circulation of vehicles and boats and to any dispute, not covered by mandatory mediation under Art. 5 (1bis) of decreto legislativo n. 28 of 2010 (see above), which concerns a monetary claim, of which the parties may freely dispose of, for a value of 50,000,00 € or less.

In other words, with the introduction of preliminary assisted negotiations, today, in Italy, most civil cases concerning a right of which the parties may freely dispose of fall under one form of condizione di procedibilità or the other. From this point of view, decreto leggen, 132 has somehow closed the circle which was originally traced by decreto n. 28 of 2010.

8. Procedural aspects

Negoziazione assistita is a highly formalized method to solve a dispute between two or more parties. The procedure starts upon the initiative of a prospective litigant who invites through his lawyer the other party to stipulate an agreement to cooperate in good faith and loyally in order to amicably solve their dispute with the assistance of their lawyers.

When this invitation is accepted by the other party (who should answer in writing, with the assistance of a lawyer, within 30 days), a covenant is drafted to start the assisted negotiation.

In such “preliminary” agreement (which must be recorded in writing) the parties must mention, inter alia, the programmed duration of their negotiations (by statute, no more than three months which may be extended for 30 more days with the parties’ joint consent).

If an agreement is reached, the relevant document is considered a titolo esecutivo (enforcement title) (see above). The parties’ signatures are certified by their lawyers, who also certify that the agreement complies with mandatory legal provisions and public order.
9. Fast track out-of-court separation and divorce

Art. 6 of decreto legge n. 132 provides for a specific application of assisted negotiation in matrimonial and parental disputes (negoziazione assistita matrimoniale).18

Until 2014, in order for spouses to separate or divorce, they had no alternative but to apply for a Court order. The parties, of course, could agree on the conditions of their separation or divorce, but still such an agreement needed to be confirmed in front of a judge and approved of by the Tribunale.

From 2014, however, the spouses are entitled to separate or divorce through negoziazione assistita (see above).

The principles are basically the same as those seen in the previous paragraphs, but here the innovation is rather more dramatic. In a separation or a divorce, as a matter of fact, the parties are now allowed to negotiate in relation to rights of which they may not freely dispose of, with public control reduced to a minimum. Actually, their agreement is subject to a review by the pubblico ministero: nonetheless, such review is rather limited and might not be so effective, so that the danger that the spouses’ or the kids’ rights may be somehow restricted is present.

The rationale of this innovation does not necessarily lie in the reduction of court congestion: more likely, this form of assisted negotiation enables the parties to separate or divorce faster (but not necessarily more cheaply...).

The procedure works just like we have seen in the previous paragraph: first, the spouses need to agree to negotiate together with the assistance of a lawyer on each side. Then, if the negotiation is successful, an agreement is duly signed, with the spouses’ signatures certified as authentic by their lawyers.

At this point, however, a further requirement is provided for by Art. 6 in comparison to “ordinary” assisted negotiation, since, as it was pointed out earlier, in this area of family law, usually the parties are not in the position to freely dispose of their rights. The parties’ agreement, therefore, must be filed with the office of the pubblico ministero, i.e. a judge who has no adjudicating power, acting as an investigating public authority 19. If the agreement does not concern minors or kids who are still not financially independent, the Pubblico Ministero is supposed to examine it and eventually grant his “nulla osta” (i.e. no obstacles to the agreement are found). Otherwise, the agreement undergoes a deeper analysis and the Publico Ministero is

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19 See M. A. Lupoi, Civil procedure in Italy, cit., p. 25.
supposed to either authorise it or not. However, when the P.M. finds some troublesome aspects in the agreement which make it impossible for him to authorise it, he is supposed to transfer the file to the President of the Tribunale who will then call the parties before him and review the agreement with them.

When all the necessary steps are successfully fulfilled, the agreement has to be handed over to the public registrar to update the civil status records.

An even faster and more informal way to separate or divorce, moreover, can be found in Art. 12 of decreto legge n. 132, which enables spouses with no minor or still financially dependent offspring to simply appear before the Mayor of the place of residence or domicile of either one of them and declare their will to separate or divorce, even without the assistance of a lawyer.20

In the case of separation, such declaration is immediately effective. As for divorce, on the other hand, the spouses are required to appear before the Mayor a second time, no earlier than 30 days later, to confirm their will to no longer be married to each other.

Art. 12 states that the parties’ agreement may not contain any “trasferimento patrimoniale” (patrimonial transfer). The ratio of the provision was very likely to not allow the parties to dispose of rights in rem in their agreement but the Ministry of Home Affair had originally declared that this rule forbade any clause in the agreement having monetary effects: in other words, in the light of this very restrictive (and arguably wrong) interpretation, parties could only agree to separate or divorce, with no further agreement on alimony or maintenance. Luckily, in April 2015, the Ministry adopted a less strict approach and alimony agreements are now allowed in this new remedy.

10. Conclusions

As we have seen in this short paper, since 2010, Italy is experimenting with A.D.R. on a large scale to try and solve some of the basic problems affecting its civil justice system.

Reactions have been mixed and the experience, so far, shows that the road to establishing a mediation culture in Italy is still long and rough.

Lawyers expressed a very strong opposition against mandatory mediation under decreto legislativo n. 28 of 2010, thus the Government decided to put them to the forefront of the “dejurisdictionaling” process, with an active role in promoting, directing and enforcing negotiations and arbitration as an alternative to judicial proceedings. One may only hope that practitioners are ready to engage in this new participative role in the administration of civil justice.

The lawmaker has also reinforced the new A.D.R. system with an eye on the parties’ pockets. Actually, when a party, which was invited to mediate or negotiate a case, fails to accept such invitation, she faces the possibility of being ruled against by the judge as concerns the costs of the case. Moreover, when a party refuses a mediator’s conciliatory proposal, she faces adverse consequences as concerns the costs of subsequent judicial proceedings when the judge renders a decision that is sufficiently close to the mediator’s proposal.

These indirect sanctions, however, so far have not proved effective and it will take time for the public to be aware of the economic implications of dismissing or not taking advantage of A.D.R..

Time will tell whether litigants and lawyers will move away from a traditionally conflicting and litigating mentality.

Slowly things appear to be moving ahead. A new road has been laid down and, though a few holes appear in the tarmac, it appears worth travelling upon.

However, it should be always borne in mind that A.D.R. suffer in taking hold in countries where the judicial system fails to provide fast and effective relief and where the case-law is so inconsistent that in many cases it is very hard to foresee the outcome of even straight-forward disputes.21

As a matter of fact, A.D.R. should be considered an “alternative” to the judicial adjudication of a dispute, not a remedy for a judicial system in crisis.

This implies that the Government may not exclusively rely on A.D.R. to solve the crisis of Italian civil justice. Some structural and institutional interventions are very badly needed; currently, however, the lawmaker seems to still be working under the incantation that civil proceedings may be rendered more effective simply by (once again) changing the rules of the code of civil procedure.

The academic community has spoken openly about the need for a change of direction, but these calls, so far, have fallen on deaf ears.

The time has indeed come for a reality check on the effects of 25 years of procedural reforms in Italy.

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21 Judicial uncertainty is one of the main reasons for the lack of success of mediation: when a lawyer believes that even if he has a weak case it might still be worth it to give it a try in court, he will not lead his client towards an amicable solution. As C. Consolo, La giustizia civile: quale volto dei nostri processi, cit., p. 1275, remarks: “Affinché la mediazione funzioni bene, infatti, è necessario che il difensore abbia una sana, doverosa, forte paura di condurre la parte ad una meritata, pesante, sconfitta all’esito dell’esperienza processuale”.

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