THE 2014 SITUATION IN ITALY.

The year 2010 marked a key moment for the evolution of mediation in this country.

In that year, the Italian legislator has enacted a law on mediation of civil and commercial disputes (Legislative Decree 4 March 2010, 28[1]), the contents of which went beyond what was necessary to implement Directive 2008/52/EC on this issue.

Despite that said directive established common principles valid for the mediation of the only cross-border disputes, they was extended also to internal disputes.

Nevertheless this was not the central issue.

The critical point was that Italian legislature introduced mandatory mediation for most of the disputes (which is not provided but not prohibited by the European Directive), namely those relating to:

- condominium ,
- property,
- division ,
- inheritance,
- family agreements ,
- lease,
- loan,
- torts from movement of vehicles and boats,
- torts from medical liability
- torts from defamation by press or by other means of advertising,
- insurance contacts,
- banking contracts
- financial contracts.

They represent well over half of all the legal dispute.

As a result of this law (which in the meantime has undergone some modifications) , who wanted to bring an action relating to a dispute on that matters, they was obliged to promote before a mediation. If the defendant did not participate in the mediation , presenting and establishing a negotiation, he received some sanctions in court.

These rules have upset the lawyers , but also other professionals , who until this time had generally ignored mediation and effective negotiation.

Lawyers were divided .

Some have seen a new job opportunity in mediation and have become mediators , while others - the majority - have considered mediation as a calamity for their own business and immediately began to boycott it, also getting on strike.

On the contrary, all other professionals expressed their interest to mediation, seeing it as a way to supplement their earnings.

Another important element that herlps to understand the situation is that the Italian legislaturor had allowed a very easy access to mediation activity, opening it to all professional and staring the minimum duration of the initial training course in only 50 hours[2].

Unfortunately, the legislator had also allowed that the quality of those qualified to teach mediation was very low: all those, who had some scientific paper published in the field of ADR, have been enabled as teachers, taking into account also the works on pure arbitration.

Consequently mediation has been taught by many professors and lawyers who had never practiced mediation. Insted of disclosing mediation techniques, such teachers merely explain the rules of law regulating mediation. Said sad situation prevented communicating to students what really mediation is.

[1] Decreto legislativo 28 March 2010, n.28.
[2] Ministero della Giustizia, decreto 18 October 2010, article 4, comma 3, letter c).

Neither students were aware of the problem, as the lessons had an usual aspect at their eyes, being accustomed to study and apply law and never having heard about negotiation techniques. Very often these improper lessons on mediation resembled those on civil procedure, that – on a psychological level – represents a "comfort zone" for lawyers and professionals who work as consultants in the process.

Luckly there were other situations. Also good standard training courses were provided, hold by high-quality teachers.

In October 2012 Italian Constitutional Court has deleted the provision which imposed the obligation to activate a mediation before to bring judicial action[3]. This decision was taken for purely formal reasons, as the Court has held that Government had not received from Parliament the power to introduce such a requirement. In other words, Constitutional Court did not answer on sensitive issues raised during the process, namely whether mandatory mediation violates the fundamental right of individuals to judicial protection. This last issue was also submitted to the Court of Justice of the European Union, that nevetheless dismissed the case without a decision about its merit, arguing that the same issue was overcome by the fact that the Italian legislation had lost effectiveness, due to said Italian Constitutional Court sentence[4].

In the meanwhile, with regards to European Council organization, the Commissioner for Human Rights has even approved the introduction of mandatory mediation, as a remedy to the tragic lenght of Italian court proceedings[5].

At the light of this complex situation, in August 2013 Italian government has issued a new law[6], in order to cope with the consequences of Constitutional Court decision, as the European Union pressed strongly for Italy to develop the use of ADR and the mediation in particular. That law was ratified by Parliament later.

The solution was a compromise: now in Italy it is no longer obligatory to conduct a mediation before to file a case in a court, but only to have an informative meeting with a mediator, who is required to provide such activity free of charge[7].

Italian law on mediation recalls the model adopted for judicial settlement. The mediator has the power to make a written proposal to parties for the settlement[8]. Such formal proposal is duly recorded and can be produced as an evidence in the trial that will be established later, when the dispute doesn't come to an agreement.
Consequently if the mediator proposal is refused and the case is consequently filed to a court, the charged judge has to compare the final outcome of the process with the content of the proposal. If the judgment leads to a result similar to that indicated in the mediator proposal, the part that had refused it has to be penalized in the statement about trial costs and expenses[9].

Said proposal power can be exercited under mediator discretion, but it becomes an obligation, when parties jointly require him/her to formulate such a proposal.

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[3] Corte Costituzionale, sentence n.272 adopted on october 24th, 2012 (in Official Journal, 12 December 2012, n.49).
[4] UE Court of Justice, joined cases C-464/2011 and C-492/2011, ordinance 8 February 2013.
[5] Council of Europe, report by Nils Muižnieks, Commissioner for Human Rights following his visit to Italy from 3 to 6 July 2012, where it's written: "*The Commissioner is seriously concerned about the excessive length of court proceedings in Italy, a long-standing human rights problem, which has considerable negative repercussions not only for individuals and the Italian economy, but also for the European human rights protection system due to a continuing influx of cases to the European Court of Human Rights. The Commissioner is aware of the complexity of this phenomenon, whose underlying causes include diverse factors contributing to the caseload of courts, many procedural aspects, as well as problems relating to court management and the role of lawyers* (point 1). … *The duration and magnitude of the problem of excessively lengthy judicial proceedings in Italy are of serious concern to the Commissioner* (point 45). … ***the Commissioner welcomes the ongoing reform measures*** *adopted or envisaged by the Italian authorities,* ***such as … the introduction of compulsory mediation in a number of civil cases****, ...* (point 47) …. *The Commissioner shares the growing consensus in Italy that the conclusive resolution of the problem of excessively long judicial proceedings requires nothing short of a holistic rethinking of the judicial and procedural system, as well as a radical shift in judicial culture.* (point 49).
[6] Decreto legge 21 June 2013, n. 69, ratified by Parliament with law 9 August 2013, n. 98.
[7] This situation arises from the new formulation of Decreto legislativo 28/2010, as it was modified by decreto legge 69/2013.
[8] Decreto legislativo 28/2010, article 11, comma 1.
[9] Decreto legislativo 28/2010, article 13.

However this mechanism is likely to conflict with the EU directive, where are not considered mediation the ADR mechanisms that end with the formulation of a formal proposal, because it breakes confidentiality[10].

In addition, this mechanism distorts the mediation itself, since it encourages parties to behave as if they were in conciliation proceedings hold by a a court.

It is therefore up to the mediator skill avoiding this risk: during the introductory phase, he needs to reassure parties about as, whether and how he will make use of this faculty.

As told above, in August 2013 the law has modify the concept of mandatory mediation. Now at the first meeting, "*the mediator informs parties about mediation purpose and functioning. In the same occasion, the mediator invites parties and their lawyers to evaluate and decide about the possibility to start the mediation*". If litigants fail to agree to begin it, the procedure ends and there are no more obstacles to file the case to the competent court[11].

The system can have its own sense, but presents a serious problem. The law states that the mediator can not claim any compensation for services provided during the compulsory briefing[12].

This circumstance severely limits the mediator ability to work professionally: as a self-employed, unpaid with public money, can not "give away" time to parties, especially if they turn to him not driven by a real interest in his business, but from a legal obligation.

This rule is actually the result of lobbying tampers of the legal profession, who tried in every way to boycott the re-introduction of mandatory mediation.

Other paradigmatic element of such lawyers behavior is the following: while strongly opposing mediation, however they have made their mediation bodies, whose activity benefits from public subsidies, meanwhile such privilege is not recognised to private mediation institutes.

Still, because of these lobbists' influence, law now imposes on parties an obligation to be assisted by lawyers them during the entire mediation[13], at least those which are mandatory. Circumstance which seems to further conflict with the Community definition of mediation, in which the protagonists are only the parties and the mediator, leaving the first the freedom to decide whether or not to be accompanied by their lawyers or other tecnical advisers[14].

Last but not the least, all lawyers are now recognised as professional mediators, even if they have not received any specific training at all[15]. This strongly contrasts with the EU directive[16], that obliges member States to ensure that citizens can have the access to good quality mediation services.

With a note, in November 2013[17] the Ministery of Justice has established that nowadays the Lawyers National Bar ("Consiglio Nazionale Forese" – CNF) has exclusive competence in establishing which is the initial and further training for mediators who are also lawyers, even if they work in mediation institute not created by CNF or lawyers local bars (id est., such standards apply even if mediators/lawyers work in private mediation institute or in Chambers of Commerce mediation institutes).

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[10] EC Directive 28/2010, considerandum 11, that states: "*This Directive should not apply to … or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute*".
[11] Decreto legislativo 28/2010, article 8, comma 1.
[12] Decreto legislativo 28/2010, article 8, comma
[13] Decreto legislativo 28/2010, artiche 8, comam 1, that states; "*Al primo incontro e agli incontri successivi, fino al termine della procedura, le parti devono partecipare con l'assistenza dell'avvocato*".
[14] EC Directive 52/2008, article 3, that states: "*<<Mediation>> means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator*".
[15] Decreto legislativo 28/2010, article 16, comma 4 bis., first phrase that says: "*Gli avvocati iscritti all'albo sono di diritto mediatori*". This means that lawyers are mediators only because the formers are lawyers admitted to the bar!
[16] EC Directive 28/2010, article 4, comma 2, that states: "*Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties*".
[17] Ministero della Giustizia, circolare del 27 novembre sulle norme introdotte dal d.l.98/2013.

Accondingly to its strong opposition to mediation, in February 2014 CNF has established very low criteria, quite ridicolous[18].

- Initial training:
  - 15 hours of practical and theorical lessons (of which only 10 reserved to the study of mediation and negotiation techiques).
  - participation to 2 mediation procedure as an observer.
- Further training: 8 hours each two years, to study cases.

This is the situation, even if the same CNF recongnizes that "*the discipline ... of the main management techniques conflict, which normally fall outside the cultural background of the lawyer ....*"
To become mediators, other professionals have to follow[19]:

- Initial training:
  - 50 hours of practical and theorical lessons (of which the half dedicated to practical training, mainly mediation simulations)
- Further training:
  - 18 hours each two years;
  - participation to 20 mediations (even if the Ministery of Justice allow to calculate also the meetings where parties decide not to proceed to mediation!)

Moreover, actually CNF has prohibited to lawyer to practice mediation in their offices: if the want to do it, lawyers have to find a different location.

This provision is now added to the other one, that prohibits to lawyers to share their office with a mediation institute[20].

Both these proibitions make very difficult

- the existence of mediation institutes created by lawyers who really belive in mediation
- to lawyers in general to practice mediation in private institutes

CNF has a clear strategy: boycotting mediation, from one side, and promoting the institute of bilateral negotiation assisted by lawyers, from the other side[21].

In this context, however, the current economic crisys fiercely interferes, as customers have fewer economic resources and are increasingly interested in new professionals, who offer services aimed to give useful answers and fast results, rather than a defence during decades of enerveting litigation in the courts. This shift serious hits the traditional conception of lawyer. After a crisis of identity, many lawyers are beginning to understand that being able negotiators becomes a trump card in professional competition, because that is what customers increasingly start to ask them. The next step should be to acquire the knowledge that, when the bilateral negotiations between the parties fails, there is space for mediation , where lawyers can continue to operate as protagonists, if they can be recognized at clients' eyes as useful advisers in the negotiations.

Anyway, the most interesting provision is nowadays the following: during a trial (also in the appeal phase), courts can order parties to have a real mediation and not only information about it. If they don't comply, the trial can't proceed further[22].

These are the main characteristcs of Italian law on mediation. For the remaining, the situation is coherent with EC Directive on mediation.

Ermenegildo Mario Appiano
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[18] CNF, circolare del 21 febbraio 2014 sulla "*formazione avvocati mediatori di diritto*".
[19] Ministero della Giustizia, decreto 18 October 2010, article 4, comma 3, letter c).
[20] Article 55 bis lawyers national code of conduct, now supported by Ministery of Justice (circolare 27 November 2013).
[21] In March 2014 CNF has submitted a proposal to the Ministery of Justice about many issues related to civil procedure in Italy: beetween them there is the institute of bilateral negotiation assisted by lawyers.
[22] Decreto legislativo 28/2010, article 5, comma 2.