

Alternative Dispute Resolution (ADR) in Italy: European Inspiration and National Problems[#]

Giorgio Fabio COLOMBO *

The legitimacy of using Alternative (or Amicable) Dispute Resolution (ADR)¹⁾ to give relief to the State-managed court system is debated in almost every advanced legal system. It seems that, while the theory of contemporary ADR, conceptually conceived by the so-called “School of Harvard”²⁾ imagined procedures of mediation being something more refined than a mere patch for the deficiencies of the national court system, it appears that now ADR is primarily being implemented by legislators as a means of reducing the work burden of judges. Italy is not an exception to this trend. The Italian situation, however, is quite peculiar for a number of reasons that will be analyzed in this paper.

* Ph.D. JSPS Postdoctoral Fellow – Ritsumeikan University, Kyoto

This paper was supported by a grant-in-aid from the Zengin Foundation for Studies on Economics and Finance.

1) While in the past the commonly accepted reading for the acronym ADR was “Alternative” Dispute Resolution, in recent years the A is often read as “Amicable”. See for example the official explanation provided by the International Chamber of Commerce (ICC) in the *ICC ADR Rules*: “The International Chamber of Commerce has issued the ICC ADR Rules for the use of parties who wish to settle their disputes or differences amicably with the assistance of a third party, the Neutral, within an institutional framework. Is it because of the amicable nature of ICC ADR that ICC has chosen to refer to ADR as «amicable dispute resolution» rather than «alternative dispute resolution», which has been more commonly used in the past. «ADR», as used by the ICC, therefore does not include arbitration but only proceedings which do not result in a decision or award of the Neutral which can be enforced at law” (*Guide to ICC ADR*, Paris, 2001, p.3). The same approach was used by the European Commission first in the *Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes* and then in the *Green Paper on Alternative Dispute Resolution on civil and commercial disputes, April 19th, 2002*: “Alternative methods of dispute resolution, for the purposes of this Green Paper, are defined as out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration proper [...]. Arbitration is closer to a quasi-judicial procedure than to an ADR as arbitrators’ awards replace judicial decisions”. (Commission of the European Communities, *Green Paper on Alternative Dispute Resolution on civil and commercial disputes*, COM(2002)196, p.6, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0196en01.pdf, last accessed 20 March 2012) and in subsequent documents.

Consistent with this approach, my paper will deal only marginally with arbitration.

2) The Harvard Negotiation Project is a research center that was founded at Harvard University in 1979. As the website of this institution says, “the Harvard Negotiation Project’s mission is to improve the theory, teaching and practice of negotiation and dispute resolution, so that people can deal more constructively with conflicts ranging from the interpersonal to the international” (http://www.pon.harvard.edu/category/research_projects/harvard-negotiation-project/, last accessed 20 March, 2012).

In Italy there are of course many kinds of ADR: from the very simple settlement agreement³⁾ to judicial conciliation⁴⁾. But I would like to focus on recent developments in Italian law regarding general civil (and commercial) mediation, and, in particular, on the enactment in Italy of the EU Directive on mediation in civil and commercial matters.

First of all, it should be remembered that most of the Italian contemporary legislation on ADR – except for labour mediation and judicial conciliation in civil litigation - has its origin in Institutions of the European Community: at least since the early nineties, European lawmakers started to enact a series of documents on extra-judicial settlement of disputes, in the framework of access to justice within the European Community. This legislative path was initially taken with the purpose of consumer protection, and in fact early acts were all focused on enabling consumer access to easy and inexpensive forms of dispute resolution.

The first major document in this path may be identified in the “Commission Green Paper on access of consumers to justice and the settlement of consumer disputes in the single market” of 16 November, 1993⁵⁾. This document, conceived with the official purpose “*to enable all the Community's consumers to gain access to justice and to deal with cross-border disputes*” focused on both in-court and out-of-court dispute resolution procedures. Nevertheless, the Commission acknowledged that international judicial disputes could result in excessive costs, and therefore expressed the intention to strengthen ADR and to develop out-of-court procedure to grant European consumers quick, simple and in expensive tools for settling intra-UE disputes.

As an aftermath of the procedure ignited by the Green Paper, the Commission developed a structured action plan with the purposes, *inter alia*, to reinforce ADR procedures. The “Action plan on consumer access to justice and the settlement of consumer disputes in the internal market” of 14 February 1996⁶⁾ traced the way to the promotion of out-of-court dispute resolution in Europe, based on six criteria, the first three of which are: impartiality (the mediator – or neutral – must be impartial); effectiveness (the procedure must be clear and time-wise); and transparency (all the stages of the procedure must be clearly understandable before accessing to the procedure itself). Moreover, considering that the EU is a multi-

3) Article 1965 of the Italian Civil Code is devoted to “*transazione*”: a contract by which parties, making reciprocal concessions, put an end to a dispute.

4) Among many legal provisions on judicial-related or annexed ADR in Italian law, are worth mentioning:

- Judicial conciliation, either before the Tribunal (Article 185, Code of Civil Procedure) or before the *Giudice di Pace* (a body similar to Japanese Summary Court. Article 320, Code of Civil Procedure);
- Non-judicial conciliation before the *Giudice di Pace*;
- Non-judicial conciliation attempt in labour disputes: for a long time mandatory, now optional (Law 183/2010);
- Mandatory judicial conciliation attempt in divorce procedure (Article 708, Code of Civil Procedure).

5) COM(93)576, available at <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:1993:0576:FIN:EN:PDF> (last accessed March 20th, 2012).

6) COM(96)13, available at <http://eur-lex.europa.eu/LexUriServ.do?uri=COM:1996:0013:FIN:EN:PDF> (last accessed March 20th, 2012).

language entity, consumers must be allowed to use their national language. As different national laws may be involved, consumers cannot be deprived in any case of the guarantees provided by their own national law. Finally, access to ADR procedure must never result in preventing resort to national court system.

In the framework of the Action plan, the European Commission noticed that almost in every European country bodies providing dispute resolution services (whether State-managed or not) were spontaneously blooming, and expressed the intent to strengthen and uniform those experimental experiences.

The following step in the road to contemporary ADR in Europe may be identified in the “European Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes”⁷⁾. This document, further expanding and detailing principles set forth in the Action plan, focused on bodies administering the ADR procedure as well as on the procedure itself. And so, under the auspices of the Recommendation, institutions taking care of mediation proceedings are impartial, but also expert⁸⁾; the content of the procedure is kept confidential while its abstract modalities must be clear and understandable; each party is given equal opportunity to present the case; procedures should be cost-free or at least cheap; no legal assistance is imposed, but the consumer is always allowed to be represented or assisted by a third party.

The Recommendation also included arbitration, and exclusively focused on consumer disputes. Two subsequent documents slightly changed perspective.

First, the “Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes”⁹⁾, where arbitration was dropped and the focus shifted on procedures being “consensual”.

Second, the “Commission Green Paper on Alternative Dispute Resolution in civil and commercial law”, 19 April 2002¹⁰⁾ broadened the scope of ADR procedures, extending the attention of the European authorities beyond business-to-consumer (B2C) disputes including also business-to-business (B2B) issues. This Green Paper is important also because it gave a detailed picture of the ADR situation in Europe and solicited a consultation between all Member States in order to prepare and enact a specific and comprehensive Directive.

The said Directive finally was enacted as “Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters”¹¹⁾. Consistent with the 2002 Green Paper, the

7) 98/257/EC, available at <http://eur-lex.europa.eu/LexUriServ.do?uri=OJ:L:1998:115:0031:0035:EN:PDF> (last accessed March 20th, 2012).

8) The debate about training and experience of the neutral will become more important in the subsequent EC acts and also in the Italian legislation. See *infra*.

9) 2001/310/EC, available at http://ec.europa.eu/consumers/redress/out-of-court/adr/acce_just12_en.pdf (last accessed March 20th, 2012).

10) See footnote 1 above.

11) 2008/52/EC, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:Pdf>

Directive also took into account B2B disputes and, again in line with previous documents, focused on mediation as the main form of ADR. The objectives of the Directive were 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 the mind of European legislators, mediation was not to be considered just a “poorer alternative”¹²⁾ to court litigation, but an autonomous and independent procedure. As it is well known, the purpose of EC Directives is to harmonize national legislation, providing a homogenous legislative reference for all Member States. Taking into account the outcome of the consultation ignited by the 2002 Green Paper, the Directive insisted on two main points. From one side, it emphasized the importance of the procedure’s quality: and therefore provided for mandatory training of the neutrals, the enactment of a specific code of conduct and provision of general State control over neutrals and bodies providing mediation services. On the other side, the Directive focused on the enforceability of the mediation agreement: it was recognized that a mediation agreement with a mere contractual enforceability would be less appealing, and could also lead to some dilatory strategy by parties in bad faith.

As usual, Italy did not immediately implement the Directive. But, as mentioned before, the Italian case is quite peculiar for a number of reasons that make the issue of ADR quite crucial.

First of all, Italy suffers from a chronically inefficient judicial system: according to statistical reports from the World Bank¹³⁾, in 2009 Italy ranked 158° out of 183 countries in civil litigation efficiency¹⁴⁾. While the number of judges per population is proportionate in comparison with other EU or OCSE countries (and far better than Japan)¹⁵⁾, a very high litigation rate still keeps Italian judges overburdened. According to the statistics provided by the Italian Bar Association¹⁶⁾, in 2008 no less than 4,600,000 disputes were brought to State court for civil litigation¹⁷⁾.

12) This is the wording used in whereas clause n. 19 of the Directive.

13) www.doingbusiness.org

14) Italy ranked one position behind Kosovo and one before the Republic of Congo, by far the worst result for a G20 member country. According to those statistics, it takes an average of 1,210 days to obtain and enforce a first instance judgment. Judicial expenses (duties, lawyers’ fees, etc.) are averagely 29,2% of the amount in dispute. Comparatively, Japan is 34° (362 days, 33,2% of the amount in dispute).

For the unreasonable time necessary in Italy to obtain a civil, or even a criminal, judgment, Italy is periodically condemned by the European Court of Human Rights to pay damages to parties prejudice by the excessive length of proceedings. The abnormal length of processes is in contrast with Article 6.1 of European Convention on Human Rights (ECHR), as well as Article 111 of Italian Constitution. In Italy, Law 89/2001 spelled out the criteria to determine whether the length of a process is “unreasonable”.

15) According to 2009 statistical data, in Italy there was a judge every 9,478 inhabitants. In Japan one for every 46,245.

16) The *Consiglio Nazionale Forense* (CNF).

17) To refer to Japan again, in the same period in Japan just 1,250,000 disputes, including criminal suits, were brought before national courts.

However, qualified attorneys themselves may be considered (and probably are) part of the problem: in Italy, in 2011, some 230,000 attorneys were counted as members of local Bar Associations¹⁸⁾: lawyers need to work, and a lawyer's work may also be litigation.

For these reasons, the development of an efficient system of ADR is vital for the efficiency of the judicial system.

Italy at last implemented the Directive by enacting Legislative Decree n. 28, 10 March 2010¹⁹⁾ (later on referred to as D.Lgs. 28/2010). The title of the Legislative Decree itself was a complex choice of words to avoid confusion between national legal lexicon and translation of English terms²⁰⁾. In accordance with the Directive, the Decree focused on mediation and basically did not take into account other forms of ADR.

The enactment of the Legislative Decree however is far from being the end of the story. A material number of uncertainties, ambiguous wordings and open problems, as well as a tough confrontation between the legislators and the Bar Association, resulted in some partial modifications to the legislative framework: nevertheless, the situation is still evolving, and there are some open issues as I will explain later.

First of all, a Ministerial Decree was necessary to provide some operational norms to make concrete appliance of D.Lgs 28/2010 and therefore, on November 2010 the Ministry of Justice jointly with the Ministry of Economic Development enacted Ministerial Decree no. 180/2010 (later referred to as D.M. 180/2010, on the requirements of mediators and mediators' trainers). And again, on 6 July 2011, another jointly issued Ministerial Decree, the D.M. 145/2011 amended D.M. 180/2010. Finally, an official Ministerial interpretation of D.M. 145/2011 was issued on 20 December 2011. This, however, seems unlikely to be the last chapter of this troubled legislative and administrative history²¹⁾.

D.Lgs. 28/2010 provided three forms of mediation: voluntary mediation (the parties

18) While the number is impressive (there are more qualified attorneys in the District of Naples than in France), this may be misleading. In fact, according to statistics provided by the Attorneys Pension System (*Cassa Nazionale di Previdenza e Assistenza Forense* or shortly CPA), about 82,000 registered attorneys declare a professional income lower than Euro 16,000 per year. This is largely due to the fact that many qualified lawyers keep their registration but engage in other profession (of course, there are those just plainly evading taxes, too!).

19) A Legislative Decree (D.Lgs.) under Italian legislation is act having force of law adopted by the Government under authorization of the Parliament (Article 76, Italian Constitution). It is often usually employed in cases of highly technical matters.

20) The Italian the word used for "mediation" was traditionally "conciliazione", as the closer lexical translation, "mediazione", is another and different legal institution (i.e. the contract by which a subject helps two parties to enter into another contract, Article 1754 of the Italian Civil Code). The Decree used both terms, implying that "mediazione" means "mediation", while with "conciliazione" (conciliation) denotes the result of reaching a settlement agreement. For the complexity of translating European documents, and the painstaking "comparative law" work behind such translations, see A. Ortolani, "Lingue e politica linguistica nell'Unione Europea", in *Rivista Critica del Diritto privato*, 1, 2002, 127.

21) As it is quite common in Italian legislative episodes, the D.Lgs. 28/2010 was amended in a scattered and uncoordinated way. For example, Art. 8 of the Decree was amended by a sub-article of the annual Financial Decree (D.L. 138/2011) on September 2011.

spontaneously decide to avail themselves of mediation services); delegated mediation (whenever deemed necessary, the judge may refer the parties to mediation); and mandatory mediation. The latter case is of course the most important, the true pivot of the Decree. In a number of selected disputes²²⁾, which cover a great part of civil litigation as a whole, before the parties may go to state court litigation they must mandatorily attempt to conciliate their disputes by mediation. If they fail to do so, the judge may still receive the statement of claim, but cannot go on with the proceedings. The Decree however, was unclear about what is meant by “attempt”; moreover, it gave no indication about what happens if the parties still refuse even to file a request for mediation with the competent body. In the end, the solution adopted was for the judge simply adjourn the procedure by scheduling another hearing no sooner than 4 months later²³⁾. After such a period expires the parties are free to continue litigation. Of course, interim and conservative procedures (as well as some other special procedures) are exempted from this mandatory attempt (Articles. 5.3 and 5.4).

The mediation proceedings provided for by D.Lgs. 28/2010 must be administered by a qualified mediation body, registered on a list kept by the Ministry of Justice (Art. 16). As further detailed by D.M. 180/2010, both the mediation bodies and the mediators themselves must meet some requirements in order to be qualified. As for the mediators, they must hold a university degree or at least be enrolled in a professional association (such as chartered accountant, builder surveyor, etc.), they must be “honorable persons” according to Italian law²⁴⁾, and they must undergo specific training on mediation theory and techniques²⁵⁾.

As said before, the Bar Association was quite critical of the implementation of the Directive in Italy. One of the most debated points was whether legal assistance should have been mandatory even in mediation proceedings. Of course, such a decision would have been definitely inconsistent with the Directive, as it is clearly stated that legal assistance in mediation procedures is always a choice but cannot be made mandatory. The Italian legislator, notwithstanding lawyers’ opposition, endorsed the European principles and acted accordingly.

To ensure proper cooperation from practicing attorneys, the Decree has imposed a duty for the lawyers to inform their client of the possibility to refer to (voluntary) mediation. If they fail to do so, the professional relationship with the client is unilaterally severable by the client, and lawyers may get no remuneration thereafter (Art. 4.3).

As it is well understandable, a detailed regulation of practical aspects of mediation procedure was not included in the Decree: it is just specified that any mediation bodies have to draft and enact their relevant detailed mediation rules, so that users may have a complete

22) Those matters include: condominium, rights *in rem*, inheritance, lease contracts, car and boat accidents, medical liability, insurance, banking and financial contracts (Art. 5.1)

23) The period was determined considering the maximum duration of a mediation procedure according to Art. 6.1. The Decree explicitly chooses this solution only when the mediation proceeding has started but has not yet come to a conclusion (Art. 5.1)

24) This means, for example, that persons with criminal records cannot serve as mediators.

25) Art. 4, D.M. 180/2010. As it may be noticed, it is not necessary for mediators to have a legal background.

knowledge of the procedure before deciding to resort to mediation. In any event, the procedure has to be light, informal and simple.

Theoretically speaking, mediation should be completely voluntary. While it is not disputed that providing a mandatory attempt is in compliance with this principle²⁶⁾, a lot of attention focused on how to make mediation procedures more appealing, also by providing sanctions to parties unwilling to attend or to cooperate.

Art. 8, D.Lgs. 28/2010, allows the judge to infer evidentiary elements from the unjustified refusal of a party to attend the mediation²⁷⁾. While D.L. 138/2011²⁸⁾ had originally reinforced Art. 8, providing for a fine for a party that refuses to attend a mediation proceeding²⁹⁾, now this provision has been abolished by L. 24/3/2012, n. 27.

One notable feature of the Italian enactment of the Directive is that mediators are allowed, whether on joint request by the parties or by their own initiative, to submit a conciliation proposal. The parties then have seven days to accept or refuse the proposal (not answering being considered as refusal). Of course any party who does not accept the proposal is free to refer the dispute to State court, but should the judgment in that case be the same as the (refused) proposal, the claimant in court has to pay all judicial expenses, including those of the losing party, plus a fine³⁰⁾.

This feature is quite controversial: while from one side mediation theories insist very much on the search of a “creative” solution (which of course may mean that the proposal could be made not taking into account matters of law), the threat may be effective only if the proposal is structured as a court judgment rendered in the same dispute. And of course, only the claimant is put under risk of this sanction³¹⁾.

As mentioned before, one key factor for ensure that mediation would be appealing is to have mediation agreements being immediately or at least easily enforceable. The Italian Decree provides for a very simple ratification by the Tribunal, after which mediation

26) The Italian Constitutional Court was called several times to judge on compliance of mandatory mediation attempts with Articles 24, 25 and 111 of the Italian Constitution, according to which anybody has the right to access State justice. In at least three consistent judgments (82/1992, 376/2000 and 403/2007) the Court, considering that after mandatory mediation attempt parties are allowed to refer their dispute to the State judge, affirmed such compliance.

27) This meant that judges could basically consider the refusal to attend the mediation just as they would judge the refusal to submit documents when required by the Court.

28) See footnote 20 above.

29) It should be considered, however, that if parties took part in the proceeding, they had the duty to pay the mediator.

30) Article 13. It is controversial how this provision is coordinated with Art. 91 of the Italian Code of Civil Procedure, which stipulates the principle by which the losing party in a judgment has to pay all judicial expenses. However, since Article 13 of D.Lgs. 28/2010 is a more specific provisions, it seems that the *lex specialis lex generalis* relationship may apply and therefore Art. 13 prevails.

31) This has been criticized by many scholars, for example F. P. Luiso, “L’arbitrato e la mediazione nell’esperienza contemporanea”, in *Quinto rapporto sulla diffusione della giustizia alternativa in Italia*, ISDACI, Milan, 2012, pp. 147-159.

agreements are enforceable just as State-court judgments³²⁾. The role of the Tribunal is limited to a mere formal control: the agreement must be compliant with public policy and mandatory provisions of law. Also, mediation procedural rules must have been respected. If those factors are met, the Tribunal automatically grants ratification.

For sake of completeness, it should be mentioned that the agreement, even when enforceable, is not *res judicata* and therefore has no evidentiary value in other disputes.

The new mediation legislation completely entered into force only on 20 March 2012³³⁾, and therefore is very early to express a judgment on its effectiveness. However, some critical consideration may be made.

First of all, it appears that numbers of mediation providers (both institutions and qualified mediators) are growing much faster than needed. The list kept by the Ministry of Justice now shows the impressive amount of 807 institutions authorized to provide mediation services³⁴⁾. Even Considering that Chambers of Commerce and professional entities like Bar Associations³⁵⁾ are *de iure* allowed to ask for registration³⁵⁾, that figure is impressive, more so as D.Lgs. 28/2010 entered into force just one year ago.

Similarly, a massive number of institutions providing mediation training were created. As of 27 March 2012, 272 institutions are qualified to train mediators³⁶⁾.

Are all those institutions really necessary? Their existence is at least questionable. The impression is that in Italy a market of mediation-related services (training, etc.) developed irrespectively of the demand for mediation itself. This is particularly true considering that a lot of “traditional”, long-established and well respected institutions provide mediation services (like Chambers of Commerce, Bar Associations) or mediation training (like Universities), so it appears that there is not really the need for such a massive number of additional private entities. Moreover, as it often happens, it is quite difficult to ensure high quality the as numbers grow.

In terms of spreading mediation culture, it seems that Italy is really lagging behind other European countries. Mediation is still somehow a “mysterious object”, sometimes perceived just as another additional step before being admitted to State justice. It is quite significant that according to statistics collected in late 2011³⁷⁾, parties filing a request for mediation chose to be assisted by a professional counsel in 84% of cases (being such counsel a lawyer in 83% of cases), while parties being summoned made this choice in 52% of cases (the percentage of lawyers here is 84%). This phenomenon has been commented on quite

32) Article 12.

33) In particular, mediation attempt for disputes relating to car and motorboats accidents became mandatory as of 20 March 2012. For other matters, the mandatory effect is in force as of 21 March 2011.

34) http://www.giustizia.it/giustizia/it/mg_1_10_3.wp, last accessed 27 March 2012.

35) No less than 190 District Bar Associations have constituted their own mediation institution.

36) http://www.giustizia.it/giustizia/it/mg_1_10_3.wp?frame10_item=11, last accessed 27 March 2012.

37) All quantitative data shown in this paper are drawn from *Quinto rapporto sulla diffusione della giustizia alternativa in Italia*, cit.

differently by lawyers and scholars. Lawyers think that this figure shows the trust people have in attorneys: even if there is no legal obligation to employ professional counsels³⁸⁾, parties decide to do so out of trust³⁹⁾. Scholars mostly say that while filing a request for mediation (or accepting to be summoned in mediation proceedings) parties are already thinking about a possible (or likely) judicial follow-up of mediation⁴⁰⁾, so the reason is basically lack of trust in amicable solutions.

Moreover, under the new regime about 70% of mandatory mediation procedures finish because one party refuses to take part in the procedure. Also judges are showing some distrust toward new procedures: empowered by D.Lgs. 28/2010 to refer parties to mediation whenever deemed necessary, deciding to do so only in 1% of cases.

While the possibility from the mediator to issue an agreement proposal was considered quite important by the legislator, this is rarely practiced. Parties required it only in 0,5% of all cases, and mediators themselves take the initiative in about 1% of the procedures⁴¹⁾.

In view of these data, it appears that Italian legislators were not able to reach the purposes for which the new mediation regulation was conceived. Many scholars think that this is really the point: Italian legislator decided to employ mediation basically with the hope to deflate the work amount of judges, not caring much about the quality of new procedures⁴²⁾. Even compliance of the new legislation with Italian Constitution is now being contested before the Constitutional Court⁴³⁾.

Also, theoretically speaking, Italian legislation is somehow a hybrid between evaluative mediation and facilitative mediation. But theoretical framework seems to be of importance only for scholars and mediation trainers, not much by legislators, mediation practitioners and even for the parties themselves.

38) It should be mentioned, however, that mediation rules of bodies constituted and operated by Bar Associations provide for mandatory legal assistance.

39) In several occasions this was the position expressed by Prof. Guido Alpa, President of *Consiglio Nazionale Forense*. Some of his press releases may be found on the website of CNF, <http://www.consigionazionaleforense.it/site/home.html>

40) See again F. P. Luiso, *op. cit.*

41) The first draft of D.lgs. 28/2010 required mediators to prepare “in any case” a mediation proposal. This was highly criticized by scholars who had occasion to read the draft. See for example S. Chiarloni, “Prime riflessioni sullo schema di decreto legislativo di attuazione della delega in materia di mediazione ex articolo 60 legge 69/2009”, in *Sull'arbitrato. Studi offerti a Giovanni Verde*, Jovene, Napoli, 2010.

42) See C. Consolo, “L'improcrastinabile riforma della legge Pinto, la nuova mediazione ex d.leg. n.28 del 2010 e l'esigenza del dialogo con il Consiglio d'Europa sul rapporto tra Repubblica Italiana e Art. 6 CEDU”, in *Corriere Giuridico*, 2010, p. 425.

43) In Italy, when judges deem that a law they are asked to apply may be against the Constitution, they suspend the judgment and send the file to the Constitutional Court.

Controversial provisions of the D.Lgs. include the possibility for mediators to formulate a proposal, the above referred economic sanctions when parties do not accept the procedure or receive a latter judgment equal to the proposal, etc. But most importantly, the need of a mandatory attempt is being challenged. While the Constitutional Court already decided in other cases (see footnote 26 above), it appears that the new legislative framework generated new doubts.

However, as mentioned before, legislation has already been amended a number of times, and will likely be amended in many other occasions before finally reaching a definitive layout. This is also a problem, because uncertainty is an obstacle in developing knowledge: as long as the legislation is periodically modified it is impossible to get a stable case law. This inevitably results in lack of knowledge, and eventually of trust, towards new procedures.

Also, new legislation is somehow endangering “spontaneous” forms of ADR, as procedures carried out outside the new legislative framework do not result in enforceable settlement agreements⁴⁴⁾, making those procedures less appealing than those developed under D.Lgs. 28/2010. But those new procedures are more expensive, and – as we have already seen – still strongly debated. So users are caught in the middle between an older and reliable, but weaker, procedure and a new one not yet convincing.

So the final question is: did Italy seriously listen to the voice of Europe, when Bruxelles said that mediation should not be a “poorer alternative” to – or even worse, just another step before – court litigation?

44) For example, in the last 25 years, a significant number of mediation protocols were executed between consumers’ associations and major corporations, especially those into utilities: telephone and Internet, gas and electricity providers. Although in telephone and Internet-providing related disputes a mandatory mediation attempt was introduced in 2002 by the Italian Authority for Telecommunications (AGCOM), mediation protocols were spontaneously entered into by both Consumers’ Associations and telephone corporations to support a smooth and quick resolution of those disputes.