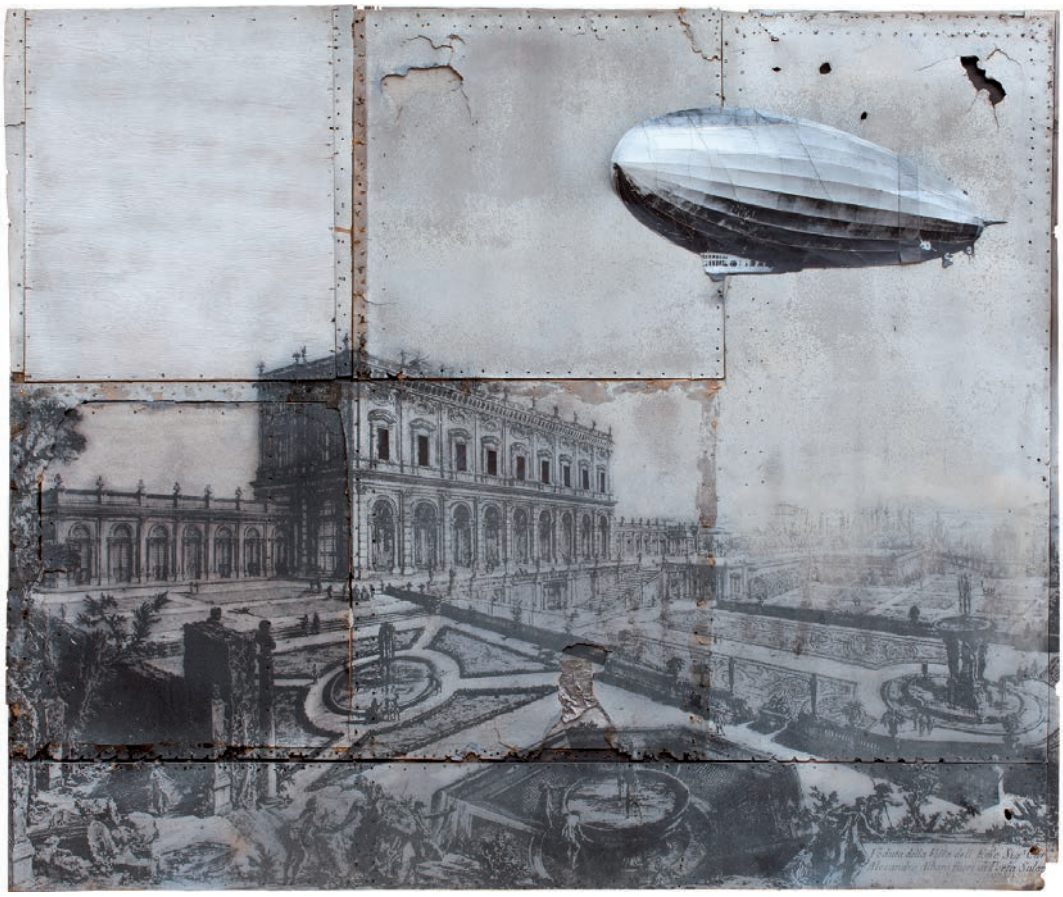
NUMERO 1 - 2014

GIUSTIZIA CIVILE

RIVISTA GIURIDICA TRIMESTRALE

ISSN 0017-0631



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Poste Italiane s.p.a. - Spedizione in a.p. - D.L. 353/2003 (conv. in L. 27/02/2004 n° 46) art. 1, comma 1, DCB (VARESE)

Composizione e stampa
Tipografia «MORI & C. S.p.A.» - 21100 Varese - Via F. Guicciardini 66

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GIUSEPPE CONTE

The Italian Way of Mediation

The recent attempt by the Italian legislator (through Legislative Decree no. 28 of 4 March 2010 and the reform of 2013, adopted after the ruling no. 272/2012 of the Constitutional Court) to promote the introduction of a mandatory mediation in civil and commercial matters has encountered various difficulties of both technical and cultural kind.
The mediation model described by the provisions is a hybrid, characterized by strong elements of ambiguity. Despite the declared preference for a "soft" mediation model with a "facilitative" function, many provisions describe an "authoritative" model of mediation, characterized by the powers of initiative attributed to the mediator, strengthened by various enforcement mechanisms. In addition, the Italian legislator has not taken into account the inadequate preparation for mediation of the judges, lawyers and economic operators (especially the cultural one). The Italian legal experience is characterized *by* the "adversarial approach" and by the "iurisdictio" model.
However, there are a few preconditions for the development of the theory and practice of mediation. The concept of the supremacy of the *iurisdictio* model, deeply imbued with imperativistic statism, is progressively declining and with it appear strongly dimmed the mythologies of the judicial truth and legal certainty as well. It will take time for this change of cultural paradigms to be transmitted to the various categories of legal practitioners. In the meantime, it will be good to review the current distinction between "interests-based system" and " rights-based system", which is misleading to the extent that it ends up

giving credit to the idea that not only the "adversarial approach", but also the "juridical approach" are an impediment to the resolution of the disputes in accordance with alternative methodologies.

Il recente tentativo del legislatore italiano (cfr. il d.lgs. n. 28 del 2010, riformato nel 2013 a seguito della pronuncia n. 272/2012 della Corte costituzionale) di promuovere l'introduzione di una mediazione obbligatoria in materia civile e commerciale si è scontrato con varie difficoltà, di ordine tecnico e di ordine culturale.

Il modello di mediazione descritto dalle previsioni legislative costituisce un ibrido, contraddistinto da forti elementi di ambiguità. A dispetto per la declamata predilezione per un modello di mediazione "soft", con funzione "facilitativa", buona parte delle previsioni legislative tratteggiano un modello di mediazione "autoritativo", caratterizzato dai poteri propositivi assegnati al mediatore, rafforzati da vari meccanismi coercitivi. In aggiunta, il legislatore italiano non ha tenuto conto della inadeguata preparazione – soprattutto sul piano culturale – degli operatori giuridici. L'esperienza giuridica italiana di risoluzione delle controversie è fortemente condizionata dall'"adversarial approach" e dal modello imperante della "iurisdictio".

Vi sono, tuttavia, alcune premesse per prefigurare un maggiore sviluppo della teoria e della pratica della mediazione. La concezione che assegna il primato al modello della "iurisdictio", fortemente impregnata di statualismo imperativistico, appare ormai in declino e fortemente appannate appaiono anche le mitologie della verità giudiziale e della certezza legale. Occorrerà del tempo perché questo mutamento di paradigmi culturali si trasmetta alle varie categorie di operatori giuridici. Nel frattempo, sarà bene rivedere la corrente distinzione tra "interests-based system" e "rights-based system", che risulta fuorviante nella misura in cui finisce per accreditare l'idea che non solo l'"adversarial approach", ma anche un "juridical approach" siano di impedimento alla risoluzione delle dispute secondo metodologie alternative.

1. - The lack of a tradition of mediation in Italy. - 2. - The attempt to introduce mandatory mediation with a view to "reconciling litigation" through Legislative Decree no. 28 of 4 March 2010. - 3. - The constitutional illegitimacy and failure, from the practical point of view, of the "authoritative" model of mediation introduced by Legislative Decree no. 28 of 2010 - 4. - The attempt by the Italian legislator, repeated in 2013, to introduce a mandatory instrument for mediation through Decree Law no. 69 of 21 June 2013, converted into Law no. 98, of 9 August 2013. - 5. - The "Italian" manner of mediation has encountered difficulties of both technical and cultural kind. - 6. - The Italian legal culture and the prevailing model of "iurisdictio". - 7. - Towards the full involvement of legal practitioners in the mediation process.

1. - The lack of a tradition of mediation in Italy.

It certainly cannot be argued that there is a long and successful tradition concerning the practice of mediation in Italy.

In reality, none of the methods and techniques of ADR have really taken root here.

For many years we have been experimenting, and with good results, with arbitration (especially *ad hoc* arbitration) as alternative to the traditional method of dispute settlement, but this solution is not perceived as economically viable by the economic operators and the evidence is that arbitration agreements are largely entered into by large or medium-sized companies.

Over time, there have been experiments mainly with forms of conciliation requiring the same public body that was appointed to exercise the judicial function to perform the functions of promoting amicable dispute settlement.

This task was originally assigned to the offices of conciliation, which, however, have increasingly concentrated their activities on the exercise of the civil judicial function within the limits of jurisdiction in terms of economic values that have increased along with the growing number of disputes, reducing their conciliation function to a minimum [1].

The Code of Civil Procedure also allows a judge to promote mediation proceedings before examining the case, and subject to the possibility of renewing the proceeding at any time during the case (art. 185 c.p.c.). But

[1] F. Lancellotti, under "*Conciliatore*", in *Enc. dir.*, VIII, Milan, 1961, esp. 391.

even this general provision has never had any serious response in terms of application because the very judges, by reason of their training and cultural context, have never placed great confidence in the mediation of disputes.

A very recent legislative change has, furthermore, inserted a new provision (art. 185-*bis* c.p.c.) into the code of civil procedure, which authorizes the judge to explicitly formulate a proposal for mediation, without limiting his power to rule on the dispute [2].

A variant of this mediation model has long been applied in the fields of labour and social security disputes, where the parties to the dispute have been required to make a prior attempt to foster extra-judicial mediation before bringing a case to court [3]. In this case, however, the mediation process takes place not in the courts, but before the administrative bodies: the provincial labour offices.

What has really been lacking in Italy has been the development and spread of mediation practices outside the prescriptive or even merely incentive legislative provisions, mediation practices properly understood as structured processes 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 impartial and competent mediators [4].

[2] Art. 77 of dl nr. 69 of 21 June 2013, converted into law nr. 98 of 9 August 2013, brought a significant modification to the code of civil procedure with the insertion of art. 185-*bis*, titled *Proposta di conciliazione del giudice*, which states «Il giudice, alla prima udienza, ovvero sino a quando è esaurita l'istruzione, formula alle parti ove possibile, avuto riguardo alla natura del giudizio, al valore della controversia e all'esistenza di questioni di facile e pronta soluzione di diritto, una proposta transattiva o conciliativa. La proposta di conciliazione non può costituire motivo di ricusazione o astensione del giudice».

[3] With the reform implemented by law no. 183 of 4th November 2010, the attempt to reach an amicable settlement of labour and social security disputes, which until that time had been mandatory, became optional.

[4] In order to offer a more complete picture of ADR methods in Italy, it is worth mentioning some recent special laws that have introduced mediation procedures or alternative dispute resolution to the traditional route through the courts in some specific areas of dispute. Some of these provisions have not been very successful, as in the case of conciliation procedures reserved for disputes between investors and intermediaries, which take place before the Chamber of Conciliation and Arbitration established by the Consob pursuant to Legislative Decree no. 179 of 8 October 2007, which are not binding, but optional. Other provisions, however, are very successful on the practical level, such as the procedures under Banking and Finance Arbitration, art. 128-*bis* of the Consolidated Law on Banking (legislative decree

Of course, in Italy there has been no shortage of doctrinal reflections and debate among legal practitioners on the wisdom of promoting the use of mediation as a key to the settlement of disputes. But it is certain that Italy cannot be counted among the countries in which mediation has historically found, and is finding, fertile ground for widespread application. In order to summarize this state of affairs, we can say that in Italy we are still far from what has been achieved in the United States, and that Marc Galanter has defined in the most succinct of terms as the "*vanishing trial*" [5]. Things have been changing in recent years, especially as a result of resolute legislative initiatives, which have made recourse to mediation binding in many areas, introducing rules of considerable legal significance and strong social impact.

In the following pages we will try to investigate the characteristics of the mediation model advocated in the 2010 legislation. We will trace the complex journey that this discipline has made, substantially depleted by abrogation by the Constitutional Court and revived in the summer of 2013, with some modifications.

We will try to examine, ultimately, the causes that have been, and still are,

no. 385, of 1 September 1993), available on an optional basis to clients but binding on banks and other financial intermediaries. In these cases, however, Banking and Finance Arbitration does not represent an attempt at conciliation but directly decides the dispute, which cannot be for a value of more than one hundred thousand euros. The Banking and Finance Arbitrator's decision is not binding like that of a judge, but there have been very few cases where banks or brokers have not complied: non-compliance is made public and would risk compromising the reputation of the operators.

Beyond the statutory and legal constraints, we must remember, as part of the efforts to promote ADR practices in Italy, the initiatives of the 105 chambers of commerce, spread throughout the whole territory of the Italian peninsula, which – brought together in a single body, the Unioncamere – agreed during the first years of this new millennium on a single national procedure for mediation and conciliation, in order to offer citizens and businesses a simple, quick and inexpensive method of alternative dispute resolution.

[5] The expression is taken from a study published by Marc Galanter in 2004: M. Galanter, *The Vanishing Trial: an Examination of Trials and Related Matters in State and Federal Courts*, in 1 *J. Empirical Leg. Stud.*, 2004, 459 ff. Galanter reported that the number of trials and the trial rates have been declining for the past four decades, particularly in the federal courts. The study documented a paradox: the proportion of cases going to trial dropped during the past forty years despite substantial increases of in many other legal indicators such as the number of lawyers, the number of cases filed, and the amount of published legal authority. This study set off a heated debate: VV.AA., *ADR and the Vanishing Trial*, in *Disp. Resol Mag.*, Summer 2004, 3 ff.; J. Resnik, *Migrating, Morphing and Vanishing: the Empirical and Normative Puzzles of Declining Trial Rates in Courts*, in 1 *J. Empirical Leg. Stud.*, 2004, 783 ff.; later Galanter himself added to his reflections: M. Galanter, *A World Without Trials?*, in *J. Disp. Resol.*, 2006, 28 ff.

an obstacle to the development and spread of mediation in Italy, in the knowledge that they cannot be summed up in a single cause, but involve a variety of *strati*, comprising factors of a political, social and cultural nature.

2. - The attempt to introduce mandatory mediation with a view to "reconciling litigation" through Legislative Decree no. 28 of 4 March 2010.

To fully understand the legal background to the recent legislation that has promoted the introduction of obligatory mediation, one must start from the premise that the length of civil proceedings is a phenomenon that, without doubt, has reached chronic levels in Italy, and for several years now.

The negative aspects do not simply regard an impairment of the right of individuals to obtain justice within a reasonable time and, therefore, to see their constitutionally protected principles put into practice [6]. They also involve public property and collective wealth seriously prejudiced because the Italian State has systematically, and over several years, been condemned by the European Court of Human Rights for the length of its proceedings and it is certain that foreign economic operators are not encouraged to invest in a country where the slowness of justice exposes their projects and economic expectations to constant frustration.

[6] According to para. 1 of art. 24 of the Constitution, «Tutti possono agire in giudizio per la tutela dei propri diritti e interessi legittimi» ("Everyone can take judicial action to protect individual rights and legitimate interests"). The second paragraph states «La difesa è diritto inviolabile in ogni stato e grado del procedimento» ("The right to defence is inviolable at every stage and moment of the proceedings"). The second paragraph of art. 111 of the Constitution affirms the right of the citizens to a fair trial within a reasonable time: «Ogni processo si svolge nel contraddittorio tra le parti, in condizioni di parità, davanti a giudice terzo e imparziale. La legge ne assicura la ragionevole durata» ("The parties to all trials may speak in their own defence in the presence of the other parties, with an equal status, before an independent and impartial court. An Act of Parliament shall lay down provisions to ensure that trials are of a reasonable length").

The constitutional principles mentioned here have not stopped interpreters from coining the category of "abuse of judicial protection", a wide-ranging formula comprising all the possibilities of legal protection which are clearly unfounded or lacking in "merit". There have now been numerous court rulings referring to this category; if one were to uphold this view to its extreme consequences, the constitutional principles mentioned above should refer only to the instances of protection deemed "worthy". On the difficulties and doubts that may rise from such a position, see: M.F. Ghirga, *La meritevolezza della tutela richiesta. Contributo allo studio sull'abuso dell'azione giudiziale*, Milan, 2004.

In this context there is a growing awareness by the government authorities and parliamentary powers of the need to develop new instruments to pursue the deflation of litigation and thus, among other things, improve the position occupied by Italy in the ranking prepared by the World Bank, *Doing Business*, that periodically confirms the evident inefficiency of the Italian justice system [7].

Legislative decree no. 28 of 2010 was issued by the Government to implement the provision contained in art. 60 of Law no. 69 of 2009 and was useful in transposing the European Directive 2008/52/EC, which also exhorted to "simplify and improve access to justice" [8].

The mediation model designed by the Italian legislature is, however, a hybrid, characterized by strong elements of ambiguity.

To begin with, the indication of the subject matter for which it is mandatory to set up a mediation process, in itself so varied, provides a first significant sign of legislative drafting which is barely decipherable and lacking in consistency [9].

Some laws seem to satisfy those theoretical expectations whereby mediation is purely "facilitative" of overcoming a conflict (*facilitative mediation*). In line with this approach is, for example, the provision that the mediator is not required to possess specific legal expertise.

Other provisions state quite the opposite.

It is envisaged that the appointed mediator is to be flanked by auxiliary mediators to make up for his or her lack of specific technical skills and in any case, during the course of the proceedings, the mediator may call upon

[7] Especially in recent years, there has been a proliferation of legislative initiatives to streamline civil rites that have become very numerous in Italy, helping to complicate the work of the judiciary and to make the judicial mechanism even more muddled: among these, law no. 69 of 18 June 2009 deserves to be mentioned, as it deals with the reduction and simplification of civil proceedings on merits.

[8] An important precedent was Legislative Decree no. 5 of 2003, which introduced into corporate law a method of conciliation which contained elements such as the ability to formulate a "proposal" for the resolution of a dispute – later transfused into the mediation model of Legislative Decree no. 28 of 2010.

[9] Article. 5, paragraph 1, of Legislative Decree. no. 28 of 2010 enumerated the following subjects: condominium, real rights, division, hereditary succession, family agreements, lease, loan of use, company rental, damages resulting from the movement of vehicles and boats, medical liability, libel in the press or other means of advertising, insurance, banking and financial services contracts.

technical consultants enrolled in registries kept at the courts (art. 8, paras 1 and 8, d.lgs. no. 28 of 2010). But even more significant is the provision that authorizes the mediator to make a proposal for mediation (art. 11, para 1, d.lgs. no. 28 of 2010). The mediator may make this proposal upon request by the parties, but also on his or her own initiative and, indeed, even when the invited party has not taken part in the mediation process [10]. The provisions give the Italian model an adjudicatory function (*adjuticative mediation*), which seems to go well beyond the "evaluative" function (*evaluative mediation*), even though a good number of scholars consider it to be scarcely compatible with the methods and techniques of mediation [11].

The ambiguity of the mediation model envisioned by the Italian legislature, however, was heralded in the definition that article 1, letter *a*), provides regarding the notion of mediation: «... the activity, by whatever name, carried out by an impartial third party and intended to assist two or more parties either in the search for an amicable agreement for the settlement of a dispute, or in the formulation of a proposal for the resolution of the dispute».

[10] Article. 8, paragraph 1 of Legislative Decree no. 28 of 2010 seemed to affirm an "obligation" on the part of the mediator to formulate a proposal for conciliation whenever the parties made a joint request, but also seemed to give him the "right" to formulate a proposal whenever an amicable settlement of the dispute could not be reached; confirmation of the possibility to formulate a proposal for conciliation even in the absence of the party invited to participate in the mediation process seems to come from the fourth paragraph of art. 8, which, in the event no agreement is reached, requires a report to be drawn up with details of the proposal and mention of the non-participation of one of the parties in the mediation process.

[11] The swing between the various models of mediation from a merely "facilitative" function and an "evaluative" function is shown by the "grid system" proposed by L.L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, in 1 *Harv. Negot. L. Rev.*, 1996, 7 ff., which distinguishes between the various positions also on the basis of the role assumed by the mediator, as simple "facilitator" or as "evaluator". This classification was later reformulated by the same author: Id., *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, in 79 *Notre Dame L. Rev.*, 2003, 1 ff. The fact that the mediator can take on an evaluative role has caused a lot of discussion: cf., for all, K. Kovach-L.P. Love, *"Evaluative Mediation" is an Oxymoron*, in 14 *Alternatives to High Cost Litig.*, 1996, 31 ff.; also those in favour do not ignore the risks connected to evaluative intervention: M.C. Aaron, *Evaluation in Mediation*, in D. Golann (ed.), *Mediating Legal Disputes: Effective Strategies for Lawyers and Mediators*, Boston, 1996, 267 ff. The possibility, however, of an evaluative methodology, defined as "decision analysis", based however on the positions and evaluations expressed by the parties is not to be excluded: D.P. Hoffer, *Decision Analysis as a Mediator's Tool*, in 1 *Harv. Negot. L. Rev.*, 1996, 113 ff.; M.C. Aaron, *The Value of Decision Analysis in Mediation Practice*, in 11 *Negot. J.*, 1995, 123 ff. On "adjudicative" mediation see the Illustrative Report on d.lgs. n. 28 of 2010.

In this legislative consideration, clearly, what is but a possible outcome of a mediation process (a conciliatory proposal) ends up almost becoming the characteristic element of the whole practice of mediation, to such an extent as to be referred to in the definition.

But the choice of a mediation model based on the *autonomy* of the parties and on the "search for an amicable agreement to the settlement of their dispute" is not so much contradicted by having made mediation proceedings compulsory for a large number of matters [12].

The move towards a *heteronomous* model of dispute resolution stands out even more when we consider the proactive powers given to the mediator, assisted by the punitive provisions introduced for those who refuse to accept his proposals and, finally, the coercive mechanisms designed to ensure the participation of the parties in the proceedings.

The Italian model of mediation introduced by Legislative Decree no. 28 of 2010 has appeared neither perspicuous nor wholly coherent from the disciplinary point of view.

Consideration of the role, duties and function of the mediator is a key point in understanding the mediation model chosen; its characteristics, its internal coherence, and its compatibility with the functions pursued [13].

On this point, the Italian legislator has proved to be uncertain and partly contradictory.

It has not made the clear choice of the European legislator which, in the

[12] The possibility that national legislations could make the use of compulsory mediation, or one subject to incentives or sanctions, is expressly provided for by article 5.2 and recital 14 of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, regarding «certain aspects of mediation in civil and commercial matters». The European Directive, from this point of view, opens up to a variety of models of mediation, merely requiring that there be no interference in access to justice («Such legislation does not prevent the parties from exercising their right of access to the judicial system»: article 5.2).

[13] The tasks of the mediator vary depending on the theoretical approach and model of the chosen discipline of mediation. In the "transformative mediation" proposed by Bush and Folger, the task of the mediator is to stimulate and facilitate, for the parties, the processes of self-legitimation and recognition of the other ("empowerment and recognition shifts"): R.A.B. Bush-J. Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, San Francisco, 2005, 65 ff. In the perspective proposed by Friedman and Himmelstein, the so-called "understanding-based mediation", the role of the mediator appears 'minimally invasive' due to the belief that the primary responsibility for the eventual resolution of the conflict should lie with the parties, which are always jointly involved in mediation with the mediator himself: G. Friedman-J. Himmelstein, *Challenging Conflict: Mediation Through Understanding*, Natl Book Network, 2008, XXIX ff.

recent Directive 2013/11/EU of 21 May 2013 on ADR for consumer disputes, expressly provides that the mediator must not only be in possession of the «necessary knowledge and skills in the field of alternative or judicial resolution of consumer disputes,» but must also have «a general understanding of law» (article 6, paragraph 1, letter *a*) [14].

Italian law does not require legal expertise on the part of the mediator, declaring that the latter lacks the «power to make judgments or decisions binding on the recipients of the service itself» (art. 1, paragraph 1, letter. *b*, d.lgs no. 28 of 2010).

Nevertheless, it has authorized the latter to formulate a proposal for conciliation, with significant sanctions for the party that does not accept the proposal and then wins in court.

This prediction appears to be particularly penalizing: the party that is found to be fully vindicated in court is not entitled to request litigation costs and expenses, and will have to reimburse those incurred by the losing party and to pay the State an amount corresponding to the court fees if the sum established in the judgment corresponds fully to that of the proposal.

The combined effect of these provisions leads to a significant distortion not only with respect to the nature and characteristics of the mediation process, but also to the traditional principle that the loser pays the litigation costs [15].

These considerations need to be even more strongly emphasised if we also consider the enforcement regime, dependent on implementing regulation no. 180 of 2010.

The implementing regulation provides that the mediator can formulate the proposal for the resolution of the dispute also in the event of failure to participate in the proceedings by the counterparty and that such a propo-

[14] Recital 36 of Directive 2013/11/EU clarifies that «It is essential for the success of ADR, in particular in order to ensure the necessary trust in ADR procedures, that the natural persons in charge of ADR possess the necessary expertise, including a general understanding of law. In particular, those persons should have sufficient general knowledge of legal matters in order to understand the legal implications of the dispute, without being obliged to be a qualified legal professional».

[15] According to the principle of the "losing party" in the dispute, the party adjudicated as losing must be ordered to cover the costs of the other party in the vindication of his rights: G. Chiovenda, *La condanna nelle spese giudiziali*, Rome, 1935, 157 f.

sal can also be made by a mediator other than the one who conducted the mediation [16].

One can only imagine the unreasonable situation that arises from the possibility offered to the mediator of drawing up a conciliatory proposal even in the absence of the party invited to the mediation process. Even if the party did not participate in the mediation process and for this reason did not accept a conciliatory proposal drawn up by the mediator in his absence, in the event of future success in court, he or she still cannot benefit from the unsuccessful party bearing legal costs and, indeed, must face serious economic consequences.

Another significant aspect is the enforcement mechanism intended to induce the parties to participate in the mediation process: art. 8, paragraph 5, of Legislative Decree no. 28 of 2010, which allows the judge at the future trial to assess the (extrajudicial) behaviour of the party in the mediation process and, in particular, to use as "evidence" the failure to participate in the proceedings [17].

The curious thing is that the manner in which the mediation process was regulated ended up compromising the pursuit of its very objectives that in principle the legislator sought to pursue [18].

In fact, in the *Explanatory Memorandum* that accompanied the introduction of the new rules, there was a professed and clear preference for the

[16] Cf. S. Izzo, *La disciplina di attuazione in materia di mediazione civile e commerciale*, in *Rassegna forense*, 2010, 577 ff.

[17] In particular Art. 8, para. 5, d.lgs. n. 28 of 2010, referring to art. 116 c.p.c. (code of civil procedure), offered the judge in a possible future court case the possibility to evaluate the behaviour of the parties as evidence during the (extra-judicial) mediation proceedings. In this way, the norm on procedure dealing with so-called "atypical evidence" (cfr. L. Montesano, *Le "prove atipiche" nelle "presunzioni" e negli "argomenti" del giudice civile*, in *Rivista di diritto processuale*, 1980, 233), ended up extending its original range of application, as the current formulation allows the judge to draw evidence only from the parties "in court" (among those to express their doubts on this: G. Scarselli, *La nuova mediazione e conciliazione: le cose che non vanno*, in *Foro Italiano*, 2010, V, 147; R. Aliberti, *Mediaconciliazione: il contegno delle parti nella procedura di mediazione alla luce del futuro (ed eventuale) processo*, 20 Octobre 2011, in *www.treccani.it/magazine/diritto*, § 2).

[18] Numerous scholars have expressed their doubts about the new instrument of mediation: cf. F.P. Luiso, *Gli strumenti alternativi di risoluzione delle controversie tra prassi ed interventi del legislatore*, in *Quarto rapporto sulla diffusione della giustizia alternativa in Italia*, edited in ISDACI, 2011; C. Consolo, *L'improcrastinabile radicale 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 *Corr. giur.*, 2010, 425 f.

"soft" mediation model, of a "facilitative" nature, considered preferable because it is characterized by a "greater ductility in relation to the true interests of the parties" and "greater social acceptability" [19].
In reality, Italian law favours an "authoritative" model of mediation, characterized by the powers of initiative attributed to the mediator and the enforcement mechanisms designed to induce the parties to participate in the proceedings and accept the conciliatory proposal made by the mediator.

3. - The constitutional illegitimacy and failure, from the practical point of view, of the "authoritative" model of mediation introduced by Legislative Decree no. 28 of 2010.

The mandatory mediation model introduced with d.lgs. no. 28 of 2010 was soundly repudiated by the Constitutional Court, that with ruling no. 272 of 30 July 2012 established the unconstitutionality of the provisions that affect ability to gain access to a court prior to recourse to the mediation process.

It should be noted that the intervention of the Constitutional Court focused on the compliance and the coherence of the delegated legislation issued by the Government (Legislative Decree no. 28 of 2010) with the delegating provisions approved by Parliament (Art. 60 of Law no. 69 of 18 June 2009). [20]
The judges of the High Court found a "misuse of power", ruling that the delegating provisions did not permit the government to enact a law on mandatory mediation, consequently elevating the mediation process to the level of the remedies of judicial review.

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[19] Cf. Ilustrative Report to the *Schema di decreto legislativo recante: "Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali"*.
[20] It should be clarified, for the benefit of foreign readers, that the judgment of the Constitutional Court concerned the compatibility of the rules on mandatory mediation contained in a delegated ordinance (No. 28 of 2010) with the principle laid down in Articles 76 («L'esercizio della funzione legislativa non può essere delegato al Governo se non con determinazione di principi e criteri direttivi e soltanto per un tempo limitato e per oggetti definiti») and art. 77, paragraph 1 of the Italian Constitution («Il Governo non può, senza delegazione delle Camere, emanare decreti che abbiano valore di legge ordinaria»).

The Constitutional Court also determined that this lack of mandate could not be overcome by directly invoking European Union law, which is neutral with regard to the mediation model to be adopted, leaving the solution to the Member States, provided that the right of citizens to appeal to the competent courts for the settlement of disputes is guaranteed [21].
In particular, the Court noted that Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 contains an invitation to the Member States to set up alternative civil and commercial dispute resolution procedures, able to help provide more cost effective and faster solutions by means of procedures tailored to the specific needs of the parties. But the European directive, although contemplating the possibility that such procedures should be prescribed by the law of a Member State, does not require them to be binding [22].
The European Parliament resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters (2011/2117-INI), while not binding, expressly suggests that the Commission's future legislative proposal on the use of ADR for consumers incorporate the principles of "freedom of choice" and "out-of-court nature" [23].
The subsequent European Parliament resolution of 13 September 2011 (2011/2026-INI) took note of the solution introduced into the Italian legal system and expressed doubts on the mandatory nature of the mediation process.

[21] Cf. Constitutional Court. n. 272/2012, § 12.2.
[22] Art. 3, lett. *a*), of the Directive states that the process of mediation «may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State». Art. 5, second paragraphs, states: «This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system». Also the subsequent Directive 2013/11/EU of the European Parliament and the Council of 21 May 2013 on alternative dispute resolution for consumer disputes (which the Constitutional Court obviously could not take into consideration) clarifies that «This Directive should not prevent parties from exercising their right of access to the judicial system» (Recital 45).
[23] According to paragraph 31.6 of this Resolution: «ADR must be optional and based on respect for the parties' freedom of choice throughout the process, allowing them the possibility of choosing, at any time, to settle their dispute before the courts; at the same time, guarantees must be provided that genuine efforts are being made to achieve successful mediation; it must not under any circumstances constitute an initial compulsory step prior to the initiation of legal proceedings, and the decision stemming from it can be binding only if the parties have been informed to that effect beforehand and expressly agree to it; despite such a decision, it must still be possible for the parties to opt for a court hearing».

But the element of unconstitutionality observed hides another aspect on which the Constitutional Court did not think it was necessary to dwell as the argument just mentioned assessment was seen to be conclusive and all-encompassing.

In fact, behind the mediation model set out by the Italian legislator there are clear elements of contrast with other fundamental constitutional principles. In fact, if one opts for an evaluative mediation model, even creating negative consequences for parties who do not accept the evaluative proposal of the mediator, inevitably a conflict with the constitutional guarantees of access to justice and the enforceability of the protection of individual rights and legitimate claims arises. These guarantees, in a mediation that is imposed on the conflicting parties as mandatory, certainly cannot be guaranteed by legislation on mediation that, despite having opted for an incisive "evaluation" model, does not care to guarantee the possession on the part of mediators of professional requirements and even allows the proposed solution to the conflict to take effect in the absence of the other party and inflicts serious economic consequences on the party which has not accepted the proposal [24].

The debate, still open in Italy, on the intrinsic coherence and functional effectiveness of the mediation model drawn up at legislative level and its corollaries relating to the compatibility of this model with constitutional principles, risks letting the poor results that this mediation model has obtained at the practical level go unmentioned [25].

The attention of operators has been considerable, as evidenced by the number of institutions on the list of qualified mediation bodies, held at the Ministry of Justice, and the interest of individuals seeking to be accredited as mediators.

Equally high, however, is the number of cases in which the party invited to

[24] These profiles in inherent contradiction and lacking in consistency with the model emerge variously from referral orders to the Constitutional Court on the question of constitutionality: cf. – for example – Tar Lazio, ord. 12 April 2011, n. 3202, in *Corr. giur.*, 2011, 995 ff. with a note by Pagni; Trib. Palermo, ord. 30 December 2011, in *Guida al diritto*, 2011, fasc. 43, 14 ff. with a note by Castellaneta.

[25] For further information on the practice of mediation in Italy see: G. Conte-V. Vigoriti (editors), *Futuro Giustizia Azione Collettiva Mediazione*, Torino, 2010; G. Conte-P. Lucarelli (editors), *Mediazione e progresso. Persona, società, professione, impresa*, Torino, 2013.

the mediation process has not attended, making it impossible for the mediation process to go ahead.
From the data collected by the Ministry of Justice, we observe a progressive decline in participation by the party invited to the mediation process: at 31st December 2012, participation stood at around 22%, a 15% fall compared with the previous year.
There is a high percentage, however, of cases in which both parties participating in the proceeding reached an agreement to end the dispute. It is worth pointing out, however, that this agreement has hardly ever been reached through the evaluative intervention of the mediator. The percentage in which the mediator made a proposal resolving the dispute was utterly minimal: ranging from 1 to 3%.
This is partly due also to the wise guidance of the various conciliation bodies that preferred – and this applies especially for those with a more institutional profile such as Chambers of Commerce and Professional Associations – to adopt regulations containing provisions that have severely limited the ability of the mediator to draft a proposal resolving the dispute when there was no joint request by the parties [26].
Wishing to offer a comprehensive assessment of these data, it may be argued that many conciliation bodies have tried to give, on the practical level, greater coherence to the mediation model created through legislation.
A very significant fact that illustrates the lack of conviction of the operators regarding the soundness and effectiveness of the mediation model proposed by the Italian legislator is also evidenced by so-called "delegated mediation", i.e., mediation that the judge, in the course of the proceedings, delegates to an impartial third party.
Legislative Decree no. 28, article 5, paragraph 2/2010 provides that a court, even in the course of appeal proceedings, may invite the parties to proceed to mediation, after assessing the nature of the case and the conduct of the parties.

[26] For example, the regulations of the Chamber of Commerce of Rome, Milan and Naples envisage a joint request by the parties in order to arrive at a proposal for the settlement of the dispute; on this point, see G. Alpa-S. Izzo, *Il modello italiano di mediazione: le ragioni di un insuccesso*, in *www.iudicium.it*, § 3, esp. note 39.

Judges have remained largely indifferent to this possibility. Indeed, the number of so-called delegated mediation cases fell within a few months of the entry into force of the new text, falling to a risible 1%, more or less. In practice, judges have not held that a process of mediation such as that provided by statute could provide a useful and effective instrument to reach out-of-court dispute settlement.

The Italian legislator has intervened to make up for this lack of success by trying to toughen the negative consequences for the party which, without good reason, does not take part in the proceedings and subsequently takes the case to court.

While it was expected, in the original provision, that the judge later called upon to resolve the dispute could draw from such conduct "evidence" for the final decision, as a result of various regulatory interventions (d.l. no. 138 of 13 August 2011, converted into law no. 148 of 2011 and d.l. no. 212 of 22 December 2011, which amended article 5 of Legislative Decree no. 28 of 2010) a provision was introduced requiring the court to order the unjustified absentee to pay the State an amount corresponding to the court fees due for the judgment.

4. - The attempt by the Italian legislator, repeated in 2013, to introduce a mandatory instrument for mediation through Decree Law no. 69 of 21 June 2013, converted into Law no. 98, of 9 August 2013.

The Italian Government has shown itself to be very stubborn in pursuing a mandatory mediation model. Even after the repeal of the most significant provisions contained in Legislative Decree no. 28 of 2010 following the unconstitutionality judgment of the Constitutional Court, the Government intervened again, with art. 84 of d.l. no. 69, June 21, 2013, to change the provisions – now amply amputated – of Legislative Decree no. 28 of 2010 and to propose mandatory mediation yet again.

The decree has recently been converted by Parliament with the law no. 98 of 9 August 2013 [27]. This step by Parliament has modified various aspects

[27] Conversion law no. 98 of 2013 was published in ordinary supplement no. 63 of the Gazzetta Ufficiale no. 194 of 20 August 2013.

of the new rules. It may be useful to summarize the final result, presenting the new rules.

In the definition of mediation appears an appropriate change even if, in itself, it is of limited significance: it is no longer stated that mediation is intended, either as a search for an amicable settlement or the formulation of a proposal for the resolution of the dispute, but that it aims for «an amicable agreement for the settlement of a dispute, also with the formulation of a proposal for resolution» (Art. 1, para. 1, lett. *a* legislative decree no. 28 of 2010, as amended by art. 84 d.l. no. 69/2013, converted into lw no. 98/2013).

The subject areas for which the mediation process must be carried out as a condition for the admissibility of a claim before a court remain virtually unchanged with the exception of the elimination of disputes regarding the payment of damages resulting from the use of vehicles and boats, and clarification on the inclusion of disputes not only in the field of medical responsibility, but also "healthcare" (Article 5 in the reformed version deriving from Art. 84 d.l. n. 69 of 2013).

The only provision that seems to be a concession to some doubt, in the obstinate determination of the Italian legislator to pursue the path of mandatory mediation, is what now appears in article 5, according to which the mandatory nature of the mediation process will be effective for the first four years following the date of entry into force of the new rules.

In short, mandatory mediation is officially subject to experimentation and becomes an instrument *ad tempus*: after the first two years, the Ministry of Justice will have to monitor the impact and effects of the new discipline.

The term of the duration of the mediation process has been shortened from the original four months to three months, trusting – of course – that the faster mediation process will not adversely affect efficiency (Art. 6, paragraph 1, of Legislative Decree n. 28 of 2010).

In addition, a new paragraph inserted in article 5 provides that a court case becomes possible from the moment when the first mediation meeting has proved unsuccessful, making access to justice easier than the original formulation did.

Some of the amendments appear to be clear concessions towards lawyers,

with a view – of course – to be able, in this way, to remove the hostility and distrust that accompanied the original legislative text.
The reformed articles 5 and 8 of Legislative Decree no. 28 of 2010 expressly provide that the parties should be assisted by lawyers in the course of various meetings.
The new art. 12, paragraph 1, added to the agreement reached by the parties to the favourable outcome of the mediation process the value of an enforceable right provided that it contains not only the signature of the parties but also their lawyers. The latter are called to attest and certify compliance of the agreement with the mandatory rules and public policy.
Article 16 now contains a new paragraph 4-*bis*, which states that «Registered lawyers are mediators by right. Lawyers enrolled with mediation bodies must be adequately trained in mediation and maintain their knowledge by means of theoretical and practical courses organized for this purpose».
Taking these new regulatory measures as a whole and formulating a summary appraisal of the discipline of mediation as reformed in the summer of 2013, we must concede that there have been some improvements, but it is also true that many of the observations already made with regard to the original mediation model introduced by Legislative Decree no. 28 of 2010 still hold true.

The reform has certainly improved some of the most important parts of the legislative text.
We can now say that the constitutional problems posed by the original law have been overcome, not only from the formal point of view but also in substance.
The formal problems have been overcome by the fact that mediation now finds its ultimate legal source in an ordinary law (Law no. 98 of 2013 converting Decree Law no. 69 of 2013) and therefore the previous problems relating to the "misuse of power" are no more actual.
Also the substantive risks related to the compatibility of new legislation with constitutional provisions safeguarding access to justice appear to have been largely overcome, especially as a result of the new provision that allows the parties to have recourse to a judge immediately after the negative outcome of the first mediation meeting (art. 5, latest version).

However, some peculiar characteristics of the Italian model of mediation remain standing.
There is no change to the mediator's power to make a proposal, nor is there any change to the enforcement mechanism connected to this decisional power of the mediator. Article 13 continues to preclude the party which, despite winning in court, refused the mediator's proposal, from claiming the litigation costs accrued after the proposal and requires that the winner be ordered to pay the costs incurred by the other party after the proposal and to pay to the court fees to the State.
Also upheld is the provision in the last paragraph of art. 8 which allows the court in the subsequent proceedings to use as "evidence" the absence of a party without justification from the mediation process, providing for payment to the State of a sum corresponding to the amount due for the costs of the court hearing.
Finally we may note that the reformer intervention in 2013 left unchanged the "confidentiality rules" which would also deserve to be better phrased/formulated.
The art. 9, paragraph 1, requires that anyone who pays his or her own service within the conciliation body or otherwise as part of the mediation process, an obligation of confidentiality in relation to the statements made or the information acquired from a party during the same procedure.
The second paragraph of the article 9 specifies this requirement forcing the mediator not to refer to the other party the statements and information obtained from a party during separate sessions.
The first paragraph of art. 10 stipulates the legal impossibility to use the statements made and the information acquired in the course of the mediation proceedings, stating that their content is not admissible as testimonial evidence and cannot be taken oath making. The second paragraph of the same article states that the mediator cannot be required to give evidence, before the judicial authority or other authority, on the contents of the declarations and information obtained during the mediation process and recognizes the defender 's guarantees of professional secrecy (see also art. 103 and art. 200 of Italian code of criminal procedure).
The Italian legislator has therefore adopted a very broad and absolute concept of confidentiality, without limitation.

We are not of course to ignore the fact that the confidentiality rules are universally intended as one of the most significant characteristics of the mediation process. We are also aware that these rules can turn out to be critical to the mediation process to function more effectively and to make full use of its potential. Very often it is the very constraint of confidentiality, which creates the conditions for the necessary mutual trust and the frank exchange of information between the parties.

It is true, however, that the confidentiality rules and the legal privilege granted to professionals involved in the mediation procedure may be the shield to hide abuses and malpractises [28].

The Italian legislator, unlike the case in other Member States, does not have even invoked the exceptions that are laid down in the European Directive 2008/52/EC, who believes that the confidentiality should be left aside when considerations of public policy are at stake (in particular to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person) and where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement (art. 7, para. 1) [29].

[28] In the countries where the practice of mediation has a more established tradition is alive the debate on the opportunity to balance the need for confidentiality with the need to prevent or otherwise punish incidents of misconduct and malpractice that can so relate to the mediators as the defenders the parties involved in the proceedings. The California Law Revision Commission, which was established with the task of assessing and suggesting legislative action, is conducting a study aimed at deepening the "Relationship Between Mediation Confidentiality and Attorney Malpractice and Other Misconduct" (for the records of meetings see: *www.clrc. ca.gov*).

[29] In France the Mediation Directive of 2008 was implemented by *Ordonnance* n. 2011-1540 of 16 November 2011, supplemented by the decree n. 2012-66 of 20 January 2012. The *Ordonnance* has introduced a general principle of confidentiality with a few exceptions which mirror the same of the Directive. In Germany the Directive was implemented by *Gesetzes zur Forderung der Mediation und anderer Verfahren der aubergerichtlichen Konfliktbeilegung*, which contains the *Mediationsgesetz*. The Section 4 of *Mediationsgesetz* states the duty of confidentiality with the following exceptions: (i) the breach of confidentiality is necessary for the enforcement of the final mediation agreement; (ii) the breach of confidentiality is required for reasons of public policy; (iii) the facts which will be released are obvious and do not require confidentiality given their importance.

5. - **The "Italian" manner of mediation has encountered difficulties of both technical and cultural kind.**

What insights can be drawn from the Italian experience, from what I have called the "Italian way of mediation", what useful ideas to be shared in a broader context of reflection, open to an international comparison?
The government authorities and parliamentary forces that have promoted the introduction in Italy of mandatory mediation for civil and commercial matters have not demonstrated, in reality, great insight on the cultural level nor particular foresight on the practical level, contributing to the quashing of the enormous potential of the instrument of mediation, forcing it into the narrowest prism of mandatory conciliation.
The Italian experience has special characteristics, which need to be taken into account such as the legislative insistence in the direction of mandatory mediation aimed at promoting an attempt at conciliation and the specific constitutional problems that this legislative initiative has raised.
It is true that the Italian experience and its currently disappointing results offer various grounds for reflection and, in particular, provides two reflection points.
The first consideration is that the mediation process derives its success and greatest efficiency from the fact that it is offered to the parties in absolute freedom and autonomy, not being imposed by "authoritative models". Authoritarian choices are likely to alter the nature of mediation and distort its most typical characteristics, compromising the effectiveness of the instrument and its ability to achieve its specific purpose.
The second consideration is that for mediation to work to its full potential, its spread cannot be entrusted to legislative initiatives of "forcible promotion" without considering what we might call "cultural shock absorbers", i.e., without involving wider processes of cultural promotion fostering a feeling of appreciation for the characteristics and purposes that distinguish this peculiar technique of ADR among legal practitioners, the world of business, and citizens.
The limited success achieved in Italy by the legislative model of mandatory mediation should be explained on the basis of these two failures: the technical and the cultural.

The Italian legislator has failed to outline really efficient procedures for mediation and, indeed, driven by the anxiety of making mediation reduce the amount of civil litigation, it has forced the nature of the instrument, accentuating its deviation towards a "heteronomous" model of dispute resolution.

This deviation towards a "heteronomous" model for dispute resolution has been perfected by subsequent legislation, increasingly introducing more effective enforcement mechanisms to induce the parties to participate in proceedings and to adhere to any proposed resolution of the dispute by the mediator.

Care is needed, however. Respecting the nature of mediation is not a matter that concerns only the theoretical aspects, but has a direct practical impact: the distortion of the mediation process can irreparably ruin – and this is precisely what has happened in Italy – the chances of the mediation process being fully efficient on the functional level.

The decision to introduce mandatory mediation is already very risky considering the fact that the practice of mediation was created and developed in the context of the autonomy of the parties and any intervention to make it mandatory, or worse, to browbeat the parties with regard to any proposed solution risks condemning the experiment to failure.

An ADR proceeding must not only be "*alternative*", but must also be "*appropriate*", as pointed out by Menkel-Meadow [30].

But in addition to these technical aspects, there are others, as mentioned, of a cultural nature. And in this, the Italian model of mediation has proved even more lacking.

The Italian legislator has not taken into account the peculiarities of the Italian legal and cultural landscape. It has taken no account of the poor and inadequate preparation for mediation of the categories most involved with it. It did not consider that neither judges, lawyers, nor economic operators have adequate training in ADR practices of this kind.

Much has been written in Italy, even in the press, regarding the hostility of

[30] C. Menkel-Meadow, *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, in *International Encyclopedia of the Social & Behavioral Sciences*, 2001, 9507.

the Italian legal profession towards the introduction of the discipline of mandatory mediation.

In fact, before asking legal professionals to change the way they work, to abandon models, attitudes and techniques refined over time through elaborate processes of acquisition and testing of skills, it is necessary not only to set up, but also to improve institutional pathways and, more broadly, cultural processes to propose and disseminate instruments for dispute settlement that can be used as an alternative to judicial review.

In effect, Italian lawyers are professionals who have gained their skills and competencies through a university education in law and then experience where the courts represent the normal route for the resolution of disputes. They have been trained to do their job in a system that relies on the recognition and implementation of rights in a complex and articulated system of hearings, built on a rigid and dialectic distinction of roles, with the impartial figure of the judge, who is responsible not only for regulating the conduct of the trial but also the *jus dicere*, through a final *dictum* which is intended to be binding on the parties and distribute among them the elements of right and wrong.

Italian lawyers are the fruit of the legal culture of their time and the system of rules which it has produced, and it is no wonder that, faced with the suggestion of alternatives, especially in the early stages, they may oppose them with reactions ranging from substantial indifference to moments of strong resistance.

These reactions are not a *unicum* of our cultural experience and our professional heritage. They have occurred in other countries, where mediation and other instruments of *ADR*, despite the initial opposition of large sections of the legal profession, have taken root deeply and fully across the fabric of the rules of their respective legal systems [31].

[31] On the hostility shown by a large part of the legal profession in the United States towards mediation and the *ADR movement* cf. J.M. Nolan-Haley-M.R. Volpe, *Teaching Mediation As a Lawyering Role*, in 39 *J. Legal Educ.*, 1989, esp. 571; D.C. Summers, *Divorce Mediation: Pro and Con, The Case Against Lay Divorce Mediation*, in 57 *N. Y. St. Bar J.*, May 1985, 7 f.; M. Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, in 3 *Negotiation J.*, 1987, 29 ff.; M.R. Volpe-C. Bahn, *Resistance to Mediation: Understanding and Handling It*, in 3 *Negotiation J.*, 1987, 297 ff.

6. - The Italian legal culture and the prevailing model of "iurisdictio".

But let us look a little more at the obstacles on the road that lead to the spread and effectiveness of mediation practices.

We have observed that in Italy as in other countries, an attitude if not of hostility then at least of suspicion has come from the practitioners. In particular, large sections of the profession have raised a number of reservations, and judges have been largely indifferent.

I have already had occasion to state elsewhere [32] that representing lawyers as instigators of conflicts in search of cases is all well and good for the pages of literary works [33], but not to a discussion capable of addressing the issue through lucid reasoning based on solid arguments.

If so, it would be enough to suppress the forensic class – as past illustrious thinkers, from Thomas More to Leibniz [34] proposed – to achieve more and more popular and efficient mediation.

The truth is that mediation can hardly develop, become widespread and efficient without the essential contribution of a wise and well-prepared lawyer class.

To obtain this result, the pressure that comes from legislation is evidently not enough.

Even today, in Italy, most of the university textbooks dedicated to the training of those who will be called to contribute professionally to the resolution of disputes – as judges or lawyers – deal entirely with the analysis of the discipline of the civil trial, with little reference to the methods and practices of *ADR*.

The manuals of civil procedure are generally based on an abstract treat-

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[32] See G. Conte, *Cultura della* iurisdictio vs. *cultura della mediazione: il difficile percorso degli avvocati italiani verso i sistemi di A.D.R.*, in *Osservatorio di diritto civile e commerciale*, no. 2/2012, 175 ff.

[33] See Jack Cade's wish in W. Shakespeare, *Henry VI*, Part II, Act IV, Scene II.

[34] In his ideal city, *Utopia*, Thomas More does not consider lawyers necessary: «They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters and to wrest the laws; and therefore they think it is much better that every man should plead his own cause, and trust it to the judge, as in other places the client trusts it to a counsellor» (T. More, *Utopia*, edited by G.M. Logan and R.M. Adams, Cambridge, 2002, Book II). Leibniz too diminished the importance of lawyers attributing to the judge the role of general lawyers to both parties: see G. Grua, *La Justice Humaine Selon Leibniz*, P.U.F. Paris, 1956, 263.

ment of the subject. Students can obtain a good knowledge of the rules of procedure, but they do not learn that the machinery of civil justice is collapsing and that a civil action is expensive, time-consuming and more often than not leaves the parties frustrated and unsatisfied.

The experience of the United States, where the *ADR* system has reached a mature stage in its application, teaches that without involving university programs it will not be possible to go far [35].

The legal universe of the legal profession in Italy is crowded with a world of signs and definitions according to lexical and conceptual pairs: prohibition/freedom, rights/obligations, wrongs/rights.

When the Italian lawyer is urged by his client to express an opinion on the conflict that is presented to him, his reasoning is coloured by the classic "*adversarial approach*" and is influenced by the prevailing model of "*iurisdictio*".

The first factor, the "*adversarial approach*", contributes to the permanence of the conflict because the focus is on considering only the distribution, in legal terms, of the grievances and rights between the parties, without any real consideration for the interests, aspirations, preferences, and the emotions of the parties [36].

The model of the "*iurisdictio*" presupposes the intervention of a third, qualified, person endowed by the public authorities with the task of settling the dispute by applying the rule of law to a specific case. The legal rules govern this intervention by means of very detailed and precise rules,

[35] The considerations of Derek Bok, former President of the University of Harvard, stimulated huge debate regarding the deficiencies in the legal training offered by *law schools*: D. Bok, *A Flawed System of Law Practice and Law Teaching*, in 33 *J. Legal Educ.*, 1983, 570 ff. On the ensuing debate, cf. the proceedings of the conference *Dispute Resolution: Raising the Bar and Enlarging the Canon*, in 54 *J. Legal Educ.*, 2004, 4 ff. The result is that today it is common practice to teach *A.D.R.* in *American Law Schools*, with a whole range of courses lauding the new approaches to the legal profession, often hiding an overpowering emphasis: *therapeutic jurisprudence*, *collaborative law*, *affective lawyering*, *restorative justice*, *holistic lawyering*, *preventive law* etc. ... (for these new subjects, see S.S. Daicoff, *Laywer, Know Thyself: a Psychological Analysis of Personality Strengths and Weaknesses*, American Psychological Association, Washington DC, 2004, *passim*).

[36] A thorough attempt at differentiating the various types of conflict in C.W. Moore, *The Mediation Process*, II ed., 1996, 58 ff., which proposes a five-part model; see also B. Mayer, *The Dynamics of Conflict Resolution: a Practitioner's Guide*, San Francisco, 2000, 4 f., which on the other hand proposes a simpler tripartite model.

showing special consideration for this "implementation" stage, which aims – from the traditional standpoint – to conform reality to the law.
The "*iurisdictio*" model appears in stark contrast to mediation, because it relies on the intervention of a third party who does "justice", by imposing a "*dictum*", which inevitably benefits one of the parties and penalizes the other.
In the mediation process, default legal, or even procedural rules are not applied, unless the parties themselves dictate, or agree to accept, them [37].
Mediation should be a voluntary process organized by the parties as they wish, with the possibility of terminating it at any time. The mediator, furthermore, has no legitimacy to impose a solution.
The contrast between mediation and the "*iurisdictio*" model is obvious.
Not surprisingly, one of the strongest arguments that detractors – or even just the diffident – rely on regarding mediation is that the spread of ADR creates a risk of decentralization, delocalization and, ultimately, the de-legitimization of the judicial function that the State exercises through its qualified public officials [38].

Let us set aside the most radical objections, which appear to be imbued with imperativistic statism and thus seek the absolute monopoly of public powers even in proceedings for negotiating the settlement of disputes.
A more refined critical approach has highlighted the risks associated with the deployment of ADR systems insofar as they could contribute to the erosion of the "public realm", meaning the public space where legal rules are produced and applied. It is a space involving numerous stakeholders who contribute not only to producing and refining legal rules, but also to

[37] It should, however, be borne in mind that, especially in countries where the spread of ADR techniques has experienced a surge, there have been phenomena of the "juridicalization" of these techniques, due to the combination of judicial and legislative support: for more details in this direction cf. especially O.G. Chase, *Law, Culture and Ritual. Disputing Systems in a Cross-Cultural Context*, New York-London, 2005, 95 et seq. R.C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, in 47 *UCLA L. Rev.*, 2000, 949 ff., he goes so far as to propose an expansion of the notion of civil public justice so as to encompass also ADR proceedings, to be entrusted to public courts.
[38] In this sense, cf. the criticisms of S.C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, in *Wis. L. Rev.*, 1994, 631 ff.; see also O.W. Fiss, *Against Settlement*, in 93 *Yale L.J.*, 1984, 1075 ff.

feeding the essential debate on social values and justice, a fundamental aspect in deliberation processes within democratic systems [39].

This is a critical position which does not underestimate the goal of "social peace", which ADR system certainly contributes to, but finds fault with the way in which it is pursued, considering that it is essential to achieve it through the theory and practice of "public justice" [40].

From another critical perspective, some authors have cited the risk that with the spread of ADR proceedings, "compromise" may become the hallmark of social relations, stigmatizing the possible "moral" weakening of the members of a community no longer interested in prioritizing the public assessment of the truth on the basis of pre-established rules, but willing to define disputes on the basis of compromises reached in confidence [41].

In reality, these critical objections hide ideological choices or at any rate, theoretical viewpoints, inclined to favour the *iurisdictio*-based model of State, claiming its superiority and underlining its positive aspects.

It should however be noted that not all of these objections, raised especially in theoretical debate in the U.S.A. can be used directly in relation to the Italian situation.

The Italian legal system offers largely different points for reflection.

The Italian judicial model does not include the use of elected judges, nor do juries play a role in the administration of civil justice, not to mention the very different rules of evidence and many other aspects [42].

These two aspects, together with the absence of significant binding precedent, severely limit already on the abstract level the contribution that the judiciary may have on political debate and discussion on moral and social

[39] Cf. D. Luban, *Settlements and the Erosion of the Public Realm*, in 83 *Geo. L.J.*, 1995, 2619 ff.; v. formally Idem, *Bargaining and Compromise: Recent Work on Negotiation and Informal Justice*, in 14 *Phil. & Pub. Aff.*, 1985, 397 ff.

[40] D. Luban, *Settlements and the Erosion of the Public Realm*, loco cit.

[41] For a reflection on the moral implications of new systems of ADR, cf. J. Coleman-C. Silver, *Justice in Settlements*, in 4 *Soc. Phil. & Pol'y*, 1986, 102 ff.

[42] On the characteristics of the American procedural model cf. the classic pages of M.R. Damaska, *The Faces of Justice and State Authority: a Comparative Approach to the Legal Process*, New Haven, CT, 1986, *passim*; see also R.A. Kagan, *Adversarial Legalism. The American Way of Law*, Cambridge, 2001, esp. 99 ff.; O.G. Chase, *Law, Culture and Ritual. Disputing Systems in Cross-Cultural Context*, 55 ff.

values in our life as a society. And if it is true that for some years now our judiciary has also played a significant role in this direction, it should be recognized that this happened not because of civil judgments, but rather in criminal matters, where the judiciary, mainly under the impetus of their investigative functions, have come to play a supporting role to other public powers.

From a more pragmatic point of view, it should be noted that the chronic suffering of the Italian civil justice and, in particular, the difficulties it has had to face for several years, as evidenced by the significant delays that it accumulates, make for very little scepticism about the possibility that the promotion of ADR instrument may adversely affect the machinery of civil justice or, more generally, trivialize political and social debate. On the contrary, in the face of so many specific episodes that border on denial of justice and the high costs of public justice – due to the economic burden imposed on those who turn to the courts, and also on account of the remaining costs borne by the public budget – it almost becomes a requirement to try alternative dispute resolution procedures aimed at settling disputes faster and at lower cost.

Turning to another aspect, it is not clear what objections can be raised to the possibility that the ongoing dispute between the parties is settled by means of an instrument such as an agreement understood as the balancing point between competing claims.

While it is true that the mediation process contemplates the presence of a third party called upon to act as a stimulus for the settlement of the dispute, it acts as a tool to support the autonomy of the individual as a prelude to the solution of the dispute by means of an act of negotiation.

Properly understood, the theory and practice of mediation do not propose, in this respect, anything particularly innovative at least in terms of instruments and the objectives pursued: they contribute to the revival of the contractual model as a paradigm for the self-regulation of private interests [43].

[43] Cf. T.J. Stipanowich, *Contract and Conflict Management*, in *Wis. L. Rev.*, 2001, 831 ff.; on the stimulus the globalization process offers from the pan-contractual point of view, see F. Galgano, *La globalizzazione nello specchio del diritto*, Bologna, 2005, esp. 114 f. and 147 ff.; M.R.

ADR proceedings do not do away with legal rules, rather they take away the supremacy of the *iurisdictio* model. In contrast to this model is the *pan-contractual* dimension, which proposes a "flexible" law, as it centres on the contractual instrument that bends to any requirement, and adapts to every need, however varied it may be. It is a particularly ductile means of regulating the interests of the parties and, for this reason, is offering renewed proof of its worth in the new global context [44].

The decline of the *iurisdictio* model is accompanied by the twilight of the myth of judicial truth and legal certainty: in Italy too, mediation can become «particularly attractive as an option» at a time when the courts of justice can «no longer convince us that their elaborate and expensive processes lead to accurate fact finding and law application» [45].

7. - Towards the full involvement of legal practitioners in the mediation process.

The negative reactions of the legal profession in relation to the mediation process show, in essence, the fear of losing their role, their place, and – in the case of lawyers – of professional earnings.

The changes made to the mandatory mediation model by the 2013 legislation are intended to allay the concerns of lawyers.

We have seen how the new rules require the presence of lawyers at the various mediation meetings and their signature is required for any agreement reached to have the force of a writ of execution.

What I have called "tactical concessions" by the Italian legislator to the legal profession are, in fact, in line with the conception of mediation that I consider most correct.

It is well known that there are very different ways of representing the mediation process, and various ideas regarding its nature and purposes.

Some guidelines tend towards a conception of mediation that views the intervention and the presence of lawyers as "bothersome".

Ferrarese, *Il diritto al presente. Globalizzazione e tempo delle istituzioni*, Bologna, 2002, esp. 137 f.

[44] Cf. G. Alpa, *"Europeizzazione" e "globalizzazione" del diritto contrattuale*, in Idem, *La nobiltà della professione forense*, Bari, 2004, 166 ff.

[45] O.G. Chase, *Law, Culture and Ritual. Disputing Systems in Cross-Cultural Context*, 113.

The mediation process is represented as unrelated to any legal logic, merely intended to highlight and bring together interests, desires, and values that have nothing to do with the universe of legal matters. From this perspective, the lawyer, with his wealth of knowledge built up on rights and wrongs, becomes a cumbersome and counterproductive presence.
These concepts and their underlying premises are respectable, but it is clear that the mediation process that they outline cannot claim to serve as a model of dispute resolution for use as an alternative to the court case.
If we want to promote the spread of a method of conflict resolution without the guarantees of a court case and we want to institutionalize this alternative form of dispute settlement, even going as far as to make it mandatory, as envisaged in Italy, it will not merely be opportune, but necessary for the parties to be accompanied by legal experts who know how to advise and assist them during the proceedings.
These lawyers, if appropriately trained [46], will be able to establish calm and frank dialogue with the client and will make a decisive contribution in order to highlight the complex set of needs, desires, aims and values that the client seeks to protect and pursue, all within a framework of full legal awareness, so as to avoid that a possible amicable settlement should be reached at the price of the ignorance of the parties to the dispute regarding the legal and economic aspects involved.
It should be borne in mind that, in the event of a significant imbalance in bargaining power between the parties, the mediation process is likely to expose the less advantaged to a number of risks [47].

[46] Lawyers should free themselves of what L.L. Riskin, *Mediation and Lawyers*, in 43 *Ohio St. L.J.*, 1982, 43 ff. and esp. 57 f., calls the two premises for judicialization: (i) the "*adversariness of parties*" and (ii) the "*rule-solubility of dispute*" and they should modify the "lawyer's standard philosophical map"; see also B. Mayer, *The Dynamics of Conflict Resolution: a Practioner's Guide*, San Francisco, 2000, esp. 98 ff. M. Millhauser, *The Unspoken Resistance to Alternative Dispute Resolution*, in 3 *Negotiation J.*, 1987, 29 ff., warns however that cultural processes cannot only involve lawyers, but all citizens, considering the fact that in many cases the clients themselves relish the concept of "lawyer as hired gun".
[47] On the "*imbalance of power*" between the parties and on the negative results that may derive from it, in terms of ADR proceedings, see O.W. Fiss, *Against Settlement*, in 93 *Yale L.J.*, 1984, 1075 ff.; critical responses in C. Menkel-Meadow, *Whose Dispute is it Anyway?: a Philosophical and Democratic Defense of Settlement (in Some Cases)*, in 83 *Geo. L.J.*, 1995, 2663 ff. and J.K. Lieberman-J.F. Henry, *Lessons from Alternative Dispute Resolution Movement*, in 53 *U. Chi. L. Rev.*, 1986, 424 ff.

The party with less economic power generally has greater difficulty in accessing relevant information and this exacerbates the asymmetry of their position. Without the assistance of a legal expert, the less advantaged could opt for an unsatisfactory settlement compared with the validity and amount of the claims made.

The fact of being deprived of economic resources and the prospect of having to face a long and costly civil trial could induce the economically weaker party to accept paltry sums, paid immediately, at the cost of seeing his position heavily penalized.

Also the manner in which the mediation proceedings are conducted may help to increase the risks.

The fact that it takes place behind closed doors, following a logic very different from that which has always distinguished the public administration of justice, is an element that if, on the one hand, constitutes the strength of mediation because it helps to facilitate the solution of the conflict, on the other hand, it may prove also to be a weakness [48]. It should be borne in mind in fact, that the "confidentiality" that marks the mediation process risks benefitting the most economically powerful. A large firm can reap many benefits from a proceeding that does not take place

[48] Article 3 of Legislative Decree no. 28 of 2010, states in the meanwhile the regulations of the body chosen by the parties are to be applied to the mediation process (1st para.), and requires that this regulation ensures the confidentiality of the proceedings (2nd para.), referring to the duties set out in art. 9 for the more analytical discipline of the duty of confidentiality incumbent on the mediator and all parties involved with the body or in the mediation process. That secrecy is a fundamental characteristic of the mediation process is an issue on which almost all authors and, essentially, the courts themselves agree: cf. *ex multis*, S.R. Cole-C.E. McEwen-N.H. Rogers, *Mediation: Law, Policy, Practice*, II ed., St. Paul (Minn.), 2001, §§ 9:1 and 9:2. At the most one can discuss the excessive importance attached to the principle (in this sense: E.D. Green, *A Heretical View of the Mediation Privilege*, in 2 *Ohio St. J. on Disp. Resol.*, 1986, 1 ff.; C. Honeyman, *Confidentiality, More or Less: the Reality and Importance of Confidentiality is Often Oversold by Mediators and The Profession*, in *Disp. Resol. Mag.*, Winter 1998, esp. 20, S.H. Hughes, *The Uniform Mediation Act: To the Spoiled Go the Privileges*, in 85 *Marq. L. Rev.*, 2001, 9 ff.). The discussions mainly concern the scope of the principle and any exceptions: for a particular case in which both parties to the dispute asked, once mediation had concluded unsuccessfully, for the mediator to appear as a witness before the court, but the mediator resisted cf. Olam v. Congress Mortgage Co., in 68 F. Supp. 2d 1110: The California District Court (N.D. California) ordered that the mediator be admitted as a witness, given that there was no chance of proving the disputed fact in another way, calling him however to testify "in camera", i.e., not in Court or during public hearing, but before the judge on a confidential basis and in a different place.

before a public authority and that keeps it out of the spotlight that may well result from appearing before a civil court [49].

It must be taken into consideration that the settlement of disputes through facilitated and rapid processes risks diminishing any deterrent effect related to unfavourable judgments, that in any case constitute an incentive (albeit minimal, at least in Italy) not to repeat the unlawful conduct in future [50].

But even apart from situations involving asymmetric conditions, it would be a really short-sighted perspective to think that a lawyer cannot play a useful and even necessary part in alternative dispute settlement proceedings rather than the traditional court route.

Those who suggest the elimination of the figure of the legal professionals are not aware or pretend not to know that quick and inexpensive settlements cannot be an objective to be pursued by any means possible. This approach, if developed, could bring about serious distortions. It could induce mediators to adopt deviant behaviour, prompting them to force the position of the parties to impose an unsatisfactory solution for the weaker party.

The very perspective that aims to differentiate an "*interests-based system*" from a "*rights-based system*" seems to me not only improper, but rather misleading.

This distinction is put forward to support the superiority of the first approach from the point of view of "*problem-solving*". But this perspective is at odds with the "*adversarial approach*", not with the "juridical" approach to the dispute.

The advocates of the "*interests-based*" approach struggle, however, to see the most consistent consequences of their position: it would be preferable if litigants were assisted in the mediation process by expert psycho-thera-

[49] Cf. D.R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping our Legal System*, in 108 *Penn St. L. Rev.*, 2003, esp. 196, according to which «The public spectacle of civil litigation gives life to "the rule of law"». And the reflections of D. Luban, *Settlements and the Erosion of the Public Realm*, cit., 2619 ff., express strong concern over a "secret" management of ADR proceedings, thus removing from public debate, where they form the legal rules and consolidate the values of a society, a large area for discussion.

[50] The fact that in Italy civil proceedings last a very long time, and punitive or aggravated damages are not envisaged at least for the most serious offences, significantly helps to reduce the deterrent effect of judgments handed down by our courts of justice.

pists, who would certainly offer more guarantees than lawyers, to stimulate processes of self-awareness in their clients [51].

The truth is that this consequence would bring with it unacceptable problems. The process of self-awareness would be only on a psychological level, however, with no-one able to adequately explain to the parties the legal and economic implications of their positions.

The solution which each litigant would tend to choose or would be directed towards could not be called "aware" because it would necessarily be built on ignorance of some of the unavoidable aspects and consequences. Nor is it conceivable that the mediator can provide all the information required, as this would force the one who is expected to remain neutral about the dispute to provide an accurate representation of the legal and economic implications of the respective positions.

But the aspect that shows best how irreplaceable the legal expert is regards the felicitous situation in which the mediation is successful. The agreement whereby the parties would be called upon to attest their mutual willingness to amicably settle the dispute constitutes an instrument legally binding on both. It is unthinkable that the parties are called upon to sign an agreement setting out rights without having full and timely knowledge of the legal content and consequences they will come up against.

[51] A consequence that Goldberg and other supporters of an "interests-based approach" are careful not to see: W.R. Ury-J.M. Brett-S.B. Goldberg, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict*, San Francisco, 1988, *passim*. It should, however, be pointed out that, setting Goldberg's position aside, the United States has developed, particularly since 1990, a legal-therapeutic approach, so today there is a school of thought and practice referred to as "therapeutic jurisprudence", dedicated to studying the therapeutic and counter-therapeutic treatment of the law and legal processes on people. The stated goal is to reform the law and legal procedures in order to promote the psychological well-being of citizens; for more information, see, for example, S. Daicoff, *The Role of Therapeutic Jurisprudence Within the Comprehensive Law Movement*, in D. Stolle-D.B. Wexler-B.J. Winick, *Practising Therapeutic Jurisprudence: Law as a Helping Profession*, Durham (NC), 2000, 471 ff.

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Pubblicità: dott. A. GIUFFRÈ Editore S.p.A. - Servizio Pubblicità, **via Busto Arsizio, 40 - 20151 Milano - tel. 02.38.089.335 - fax 02.38089426 - e-mail: periodici@giuffre.it**

Direttore responsabile: Antonio Delfino
Registrazione presso il Tribunale di Milano al n. 6745 del 28 dicembre 1964
R.O.C. n. 6569 (già RNS n. 23 vol. 1 foglio 177 del 2/7/1982)
Pubblicità inferiore al 45%

rivista associata all'Unione della Stampa Periodica Italiana

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Luca Pignatelli
Veduta della Villa dell'Emo. Signore Cardinale Alessandro Albani fuori di Porta Salaria.
Icons Unplugged, 2011. Tecnica mista su masonite e materiali vari, cm. 201 x 240.
Crediti fotografici: Giuseppe Anello

Il tempo romantico delle mongolfiere ebbe fine con l'avvento dei dirigibili. Fu la volta dei viaggi intorno al mondo su mezzi avveniristici nella costruzione e nell'ambizione: che li spingeva in alto per farsi trattenere, nell'aria, da gas ancora più leggeri. La storia dei dirigibili si consumò, nel volgere di pochi anni eroici, in esplosioni ed incendi in pieno cielo. L'instabilità dei gas (i primi mezzi viaggiavano contenendo nuvole di idrogeno) rinnovò a cavallo tra ottocento e novecento il mito di Icaro dalle ali di cera sciolte dall'incontro con i raggi del sole. Ai giorni nostri nuovi sofisticatissimi dirigibili a struttura rigida solcano i cieli che coprono le aree più inospitali del pianeta, permettendo escursioni scientifiche (ma anche turistiche), iniziative industriali e commerciali in territori-limite come le regioni artiche.
Cosa avrebbe pensato l'eccellentissimo signor cardinale Alessandro Albani, fuori di porta Salaria, ma anche a passeggio (spaesato) nei giardini di villa Emo, alzando il viso al cielo e vedendo correre dritto sulla punta del naso aguzzo un vecchio dirigibile di primo novecento? Cosa sarebbe passato per la mente dei naviganti guardando giù in terra la villa e le trame dei suoi giardini? Cosa sarà saltato in testa a Luca Pignatelli nel combinare immagini violando spazio e tempo, mischiando fonti da stampe e fotografie, e ricomponendo il tutto nella pittura su vecchie superfici di risulta?
La vernice è usata con parsimonia, e limitata al bianco e al nero. Non-colori; se volete, colori delle prime fotografie (che registravano ombre nel pieno della luce). Il fondo è composto da fogli di masonite. Il materiale fu inventato dal signor Mason negli anni d'oro dei dirigibili. Un elaborato della segatura, massicciamente usato per le parti nascoste del mobilio industriale, sensibilissimo agli eventi atmosferici, e svelto a marcire se esposto a luce, aria ed acqua. L'effetto è di incertezza, disequilibrio, precarietà.
Sembrerebbe: come nel viaggio senza un programma definito, fuori da modelli comportamentali, al riparo da velleità esecutive. Insomma, come nei giri di chi va a zonzo. Ma non è così. Nella casualità del contesto, nell'incerto incrocio di piani e traiettorie, in un ambiente così familiare da rivelarsi inospitale nella sua ostinata indecifrabilità (siamo a Roma oppure a Vedelago, dalle parti di Treviso; intorno al 1810 o al 1920?) si consumano piccoli e ostinati progetti. Una superba villa palladiana; la natura dominata e addomesticata in un geometrico giardino; il cielo violato da una macchina potente.
Dove tutto scorre e si consuma, insiste la testimonianza umana. Costruire il senso delle cose e distribuire l'ordine. Fare cultura. Benaugurante, per il nostro progetto che si avvia.

(fdm)