Fitting the Forum to the Fuss While Seeking the Truth: Lessons from Judicial Reforms in Italy

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While settlement has long taken center stage in common law cultures, giving rise to the "settlement judge", it is also gaining ground in continental civil law cultures, creating unique judicial roles that broaden the repertoire of judicial function. The study uncovers an informative new judicial role arising from reforms in Italy, one that combines mediation awareness, adversarial settlement-seeking and inquisitorial truth-seeking, and which we named: "fitting the forum to the fuss while seeking the truth." We focus on the Florence first-instance court in Italy, whose model for implementing recent reforms encouraging settlement, mediation and judicial conciliation, is being replicated by other courts in the country. We examine the actual involvement of Italian judges in reaching consensual dispositions of civil cases and include a docket analysis of civil cases, findings from interviews with judges and an analysis of court observations.

Despite the strong preference for adjudication in Italy, judges are using unique tools to encourage settlement. Their intervention correlates with an increase in settlement prospects. This finding, combined with the finding that less than half of the cases (42%) are disposed through adjudication, raises the possibility that the vanishing trial phenomenon, well documented in common law systems, may slowly and uniquely make inroads in this continental state. In addition, judges view their settlement role as another form of adjudication while viewing mediation as a broad, transformative alternative. The sharp separation between in-court justice and out-of-court justice may offer a new model of justice that avoids institutional cooptation of mediation, a problem in common law systems.

INTRODUCTION

The role of judges has changed dramatically in common law countries—from adjudicating cases to, for the most part, managing them in the pre-trial phase until they settle.[1] Settlement has taken center stage in civil justice, largely through bargaining between lawyers on the background of

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[1] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982).

judicial management of cases.[2] Civil trials take place in only about 0.9% of U.S. federal court cases[3] and at an even lower percentage on average in state courts.[4] Studies in England and Wales, the Canadian province of Ontario, and Israel show a comparable decrease in the trial rate, lending support to the observation that "the vanishing trial" is a trend in common law systems.[5] Opinions range from viewing the phenomenon as "a continuing evolutionary development of our Anglo-American legal system"[6] to a problem of judicial accountability and access to justice, as judicial settlement practices occur mostly off the record.[7]

Though an elaborate discussion of judges' role in a settlement culture has developed in the United States,[8] the roles of judges in encouraging settlement—i.e., judicial conflict resolution (JCR)—in other legal systems has remained largely unexplored.[9] Do JCR practices occur in continental civil law

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[2] *See* Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009) ("Settlement has become the modal civil case outcome.").

[3] *U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2018*, U.S. DIST. CTS. tbl.C-4 (2018), at https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2018.pdf.

[4] THE NATIONAL CENTER FOR STATE COURTS (NCSC), https://www.ncsc.org/Services-and-Experts/Areas-of-expertise/Court-statistics.aspx (last visited Apr. 13, 2021).

[5] *See* Marc Galanter, *The Vanishing Trial*, 10 DISP. RESOL. MAG., Summer 2004, at 3. (describing the first description of the vanishing trial phenomenon, focusing on the United States); *see generally* Marc Galanter, *A World Without Trials*, 1 J. DISP. RESOL. 7 (2006) [hereinafter Galanter, *World Without*] and Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J EMPIRICAL LEGAL STUD. 735 (2004) (discussion of the phenomenon's prevalence in common law systems). *See also* Ayelet Sela et al., *Judges as Gatekeepers and the Dismaying Shadow of the Law: Courtroom Observations of Judicial Settlement Practices*, 24 HARV. NEGOT. L. REV. 83 (2018) (Much like Canada, Israel has a common law, adversarial system, due to former British governance.).

[6] Carrie Menkel-Meadow, *Is the Adversary System Really Dead? Dilemmas of Legal Ethics as Legal Institutions and Roles Evolve*, 57 CURRENT LEGAL PROBS. 85, 87 (2004).

[7] *See* Resnik, *supra* note 1, at 378. ("Managerial judges frequently work beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review"); *see also* Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 60 (2004). For an exploration of the pros and cons of the phenomenon, see John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. ON DISP. RESOL. 569, 596 (2006).

[8] *E.g.*, Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018); Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261 (2010); Anna E. Carpenter et al., *Studying the New Civil Judges*, 2018 WIS. L. REV. 249 (2018).

[9] *See* Valentina Dimitrova-Grajzl et al., *Understanding Modes of Civil Case Disposition: Evidence from Slovenian Courts*, 42 J. COMPAR. ECON. 924, 925 (2014)

countries, in which the judicial role is generally substantially different? If so, how do they differ from judicial practices in common law countries? Might comparative data open new avenues for redefining the judicial role? In general, how do judges' various actions affect the mode of disposition of cases?[10]

The continental civil law setting raises some contradictory expectations as to the role of judges in encouraging settlement and ADR—on the one hand, continental judges, who are expected to be more involved and active in the legal process,[11] may be apt to encourage settlements thereby contributing to the disappearance of trials. On the other hand, considerable powers were given to judges traditionally to seek out the truth and adjudicate upon it: can these truth-seeking powers and traditional preference for adjudication cohabit with judicial settlement-seeking?[12] What impact does the encouragement of mediation through legal reforms have on in-court and out-of-court justice in continental civil law systems? Can ADR make inroads in a legal culture that strongly favors adjudication over settlement?[13]

Italy is a remarkable laboratory for exploring these questions due to its introduction of a wide range of reforms in the past decade.[14] The reforms

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("Aside from data on US courts and a few other common-law jurisdictions…hardly anything is known about modes of civil case disposition worldwide."); *see* Sela et al., *supra* note 5 for a review of judicial practices promoting settlement in Israel, a common law country; and Galanter, *World Without*, *supra* note 5 (mentioning examples of the vanishing trial phenomenon in common law countries).

[10] *See generally* Michal Alberstein, *Judicial Conflict Resolution (JCR): A New Jurisprudence for an Emerging Judicial Practice*, 16 CARDOZO J. CONFLICT RESOL. 879 (2015) (Judicial practices to encourage settlement have been characterized as judicial conflict resolution (JCR) practices).

[11] Mirjan Damaska, *The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments*, 45 AM. J. COMP. L. 839 (1997).

[12] *Agreements Resulting from Mediation: Judicial Review, Avoidance and Enforcement*, MÜNCHEN: SELLIER at 7 (2015) (The differences between adjudication and mediation are well explained by Remo Caponi) ("Adjudication fundamentally entails two components: (a) a substantive element, i.e. predetermined legal rules or standards, and (b) a procedural one, i.e. the application of such rules by a judge or arbitrator to facts in the course of a due legal process. Mediation reveals parallel, but different, aspects. As to the substantive element, with the exception of mandatory rules, the rules, standards, principles and beliefs that guide the resolution of the dispute in mediation are the same as those held by the parties.").

[13] For background on the lack of a mediation culture in Italy, see Giuseppe Conte, *The Italian Way of Mediation*, 6 ARBITRATION L. REV. 180, 180–203 (2014). *See also* Paola Lucarelli & Giuseppe Conte, *Mediazione e Progresso—Persona, Società, Professione, Impresa*, 235 (UTET 2012); Giovanni Matteucci, *Mandatory Mediation, the Italian Experience*, 16 REVISTA ELETRÔNICA DE DIREITO PROCESSUAL 189 (2015).

[14] *See Mediation Models and the Impact of the 52/2008 Directive on Civil and Commercial Mediation in Europe.* Paper presented at a conference on *Advances in*

promote ADR and judicial conciliation, offering judges a variety of tools to encourage settlement, despite a traditional preference for adjudication in the country as well as an emphasis on the public nature of trial.[15] Interestingly, despite these factors, the reforms were not merely symbolic but in fact far surpassed the minimum requirements set by the 2008 European Mediation Directive[16] in an effort to make a dramatic change in the efficiency of case management. The reforms were introduced as a response to pressure exerted by the European Union on Italy for its severe backlog—in 2009, Italy had nearly six million civil pending cases.[17]

Yet the perceived exogenic nature of these reforms bred skepticism regarding the ability to implement them and some resistance with the introduction of mandatory mediation (discussed in Chapter III).[18] In the initial years of reforms, the chances of changing the judicial role seemed slim due to a lack of a settlement culture and the question of whether judges would voluntarily use the tools at their discretion to limit adjudication.[19] In addition, at the outset, mediation was generally not a popular way to solve conflicts.[20]

Comparative and Transnational ADR: Research into Practice, Hong Kong Faculty of Law, March 19.

[15] Conte, *supra* note 13; Michele Taruffo, *Ideologie e teorie della giustizia civile, in* 247 REVISTA DE PROCESSO 1 (2015) (It.). It is important to note that the public nature of trial has traditionally been an important part of common law systems as well, historically raising criticism of the onset of settlement culture; *see* Owen M. Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984) and Owen M. Fiss, *The Supreme Court 1978 Term Forward: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

[16] European Commission, *EU Overview on Mediation*, European Justice, (last updated 7/10-2020), https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do.

[17] *See generally* Paola Lucarelli, *Il Paradosso dell'Obbligatorietà del Tentativo tra Limiti e Virtù della Scelta Normativa, in* MEDIAZIONE DEI CONFLITTI. UNA SCELTA CONDIVISA (Paola Lucarelli ed., 2019).

[18] *See* Matteucci, *supra* note 13, at 206 ("Italian judges …considered [and still consider] mediation as the Child of a Lesser God." (alteration in original)).

[19] *Id; see also* Simona Grossi, *A Comparative Analysis between Italian Civil Proceedings and American Civil Proceedings before Federal Courts*, 20 IND. INT'L & COMP. L. REV. 213, 230, 280 (2010) ("[S]ettlement procedure still remains a 'dead' instrument that is rarely used by the parties….Both the lack of a settlement culture and the lack of any real duty of the judge to try to settle the case between the parties, at the beginning or throughout the proceedings, make the Italian proceedings inefficient.").

[20] *See* Grossi, *supra* note 19, at 230 ("Mediation [in 2010] is not yet a popular ADR tool in Italy. While there are examples of mandatory mediation in the Italian legal system [e.g., in family law, in labor issues and in disputes concerning specific corporations' subject matters] and of private mediation… the tool is not used as a real dispute resolution tool. The number of cases held by private mediation providers is low and mandatory mediation is entered just as a necessary step to access the ordinary justice in court." (alteration in original)).

Another seeming obstacle to encouraging settlement in Italy is that civil trials end at a point that is comparable to what in common law systems would be considered the end of the preliminary stage: There is no discovery phase in the Italian legal system (while in common law systems discovery is a central part of the pretrial); discovery occurs until nearly the end of the trial.[21] In addition, the cost of civil trials is relatively low.[22] There might not be much incentive to settle a case after discovery, when no further proceedings and costs are required in order to obtain a written verdict. This may raise the expectation that cases will not settle as easily in the Italian legal system.[23]

Following legislative reforms in Italy, we set out to study and characterize their influence on judicial practice. Italy suggested a challenging quantitative picture: prior to the reforms, the vast majority of civil cases were decided after trial.[24] Yet we had some indications of a higher settlement rate in civil cases from research at the Florence Court of First Instance (the Florence Tribunal), which was taking proactive steps to implement the reforms.[25] Thus, we analyzed court documents in the Florence Tribunal relating to cases during 2013–2016. We also conducted interviews of judges and courtroom observations to obtain an in-depth understanding of the findings.

While the study began at a time at which the potential impact of the reforms was questionable, today the reforms have already made their mark on a public scale. The number of yearly mediations in Italy, more than 250,000 cases, is significantly higher than that of many other European countries.[26]

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[21] Grossi, *supra* note 19.

[22] *See generally* Pablo Cortes, *A Comparative Review of Offers to Settle: Would an Emerging Settlement Culture Pave the Way for Their Adoption in Continental Europe?* 32 C.J.Q. 42 (2012).

[23] *See* F. Z. X. Lee & D. Bernhardt, *The Optimal Extent of Discovery*, 47(3) RAND J. OF ECONS. 573 (2016) (analysis on the effect of discovery on settlement).

[24] *See* Giuseppe De Paola & Ashley E. Oleson, *Regulation of Dispute Resolution in Italy: The Bumps in the Road to Successful ADR, in* REGULATING DISP. RESOL. 239 (Felix Steffek & Hannes Unberath, eds., 2013) (In addition, an indication of only a 2 percent settlement rate was first given to us during an initial communication with Dr. Marco Fabri, the Director of the research institute on judicial systems in Italy (IRSIG-CNR), following his initial inquiry within the province of Bologna).

[25] This information was gathered in a project conducted in the civil division by Prof. Paola Lucarelli and her team (Laboratorio Un Altro Modo). The project, called *Nausicaa*, was a successful experiment carried out in two subsequent versions (*Nausicaa I*, *Nausicaa II*). The project allowed graduate students and legal professionals to work together in the breeding ground of the new culture of mediation.

[26] *See* Luigi Cominelli, *Mediation Models and the Impact of the 52/2008 Directive on Civil and Commercial Mediation in Europe*, Presentation at Hong Kong Faculty of Law's Advances in Comparative and Transnational ADR: Research into Practice (Mar. 9, 2019)

Pending civil cases declined to 3.6 million at the end of 2017, and at the end of 2018 dipped below 3 million (2,915,313).[27] The improvement in the quality of the judicial process has allowed Italy to regain 36 positions in the World Bank's international rankings for business friendliness (ranking 87 in 2011 and 51 in 2018).[28] Regarding the ease of enforcing contracts, Italy climbed from the rank of 158 to 111 between 2011 and 2018.[29] Lately, scholars have also noted a transition towards mediation and settlement, going as far as to say that mediation has entered the mainstream.[30]

The study captures a transitional moment in an adjudication-based culture as it moves to significantly incorporate ADR and judicial conciliation. This moment, while captivating in itself, has wider implications. The Italian reforms may give rise to a unique hybrid model that extensively integrates adversarial and inquisitorial elements. No legal system is "pure" in nature: legal systems often borrow elements from one another.[31] Yet the very

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(relying on data from the Ministry of Justice DG STAT database, and the ISDACI database, whose 2017 Ninth Report over the diffusion of alternative justice in Italy can be found at http://www.isdaci.it/wp-content/uploads/2016/06/eBook_nono-rapporto_ISDACI.pdf (accessed June 3, 2021)).

[27] *See* European Commission for the Efficiency of Justice (Cepej), *infra* note 50 at 247; *see also* Cominelli, *supra* note 13. In relation to 2018 data, see Italian Ministry of Justice, *Data nazionale dei procedeimenti civili pendenti a fine periodo*, MINISTERO DELL GIUSTIZIA 2 (July 7, 2020), https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST1288006&previsiousPage=mg_2_9_13; *see also* Associazione Nazionale Forense, *Monitoraggio della giustizia civile*, ANF (May 30, 2019), https://www.associazionenazionaleforense.it/le-statistiche-del-ministero-della-giustizia-facciamo-chiarezza/.

[28] "Quality of Judicial Process" is a measure in the World Bank Report. *See* World Bank Report, *Doing Business*, THE WORLD BANK 5 (2019) (with data up to mid-2018), http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf; *see also* World Bank Report, *Doing Business,* THE WORLD BANK 5 (2012) (with data up to mid-2011), https://www.ihk-krefeld.de/de/media/pdf/international/doing-business/italien-doing-business-in-italy-2012.pdf.

[29] *Id.*

[30] Cominelli, *supra* note 26, at 2 ("[T]he Italian Government…confirmed the value of the reform, to which we owe the fact that mediation has definitely entered the legal mainstream, and that judges and lawyers in particular have largely understood the benefits.")

[31] *See* Grossi, *supra* note 19, at 213 ("The Italian and the U.S. legal systems are not purely inquisitorial nor purely adversarial…they share similarities and can learn from each other…the many similarities between the two systems suggest that a hybrid model could be proposed for adoption."); *see also* J.W. Diehm, *The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries*, J. Transnat'l L. & Pol'y 11 (2001).

substantial reforms introduced in Italy seem to be resulting in broad rather than incremental change.[32] Court observations and interviews with judges that we conducted as recently as 2018 and analyzed in this study lend further support to the ongoing transition in Italy. As Italy incorporates large elements associated with a common law culture into its continental civil law system, such as the following analyzed settlement practices, it becomes more relevant as a potentially instructive paradigm for countries with either legal system.

We will begin in Part I by exploring the inclination toward settlement and judicial truth-seeking in continental civil law countries (historically associated with an inquisitorial tradition) and common law countries (often associated with an adversarial tradition). In doing so, we will review the legal culture in Italy before the reforms. Part II will review the unique legal instruments given to judges in Italy for encouraging settlement and mediation. Part III will present the tools for cultural transformation that developed inside the Florence Court of First Instance through a collaboration with Florence University scholars. Part IV will present empirical findings from a docket analysis that we conducted on a representative sample of civil cases in the Florence Court of First Instance. We will also present findings from interviews and court observations examining judicial involvement in promoting settlements. Part V will discuss implications of the findings and will try to answer some of the questions presented in the introduction as to the vanishing trial and the role of judges in continental civil law systems. We will present the notion of "fitting the forum to the fuss while seeking the truth,"[33] a unique phenomenon that rose from the findings, and possibly has implications for judicial reform in a variety of legal systems.

I. TRUTH-SEEKING AND SETTLEMENT ACCORDING TO INQUISITORIAL AND ADVERSARIAL TRADITIONS

A. *Principal Differences*

While it is important to keep in mind that no legal system is pure in nature, legal systems can, generally speaking, be distinguished as having adversarial origins (as found in common law countries such as the United States, England and Australia) or inquisitorial origins (as found on the

[32] As expressed, among others, by Italy's improved ranking in quality of judicial process in *Doing Business*, *supra* note 28.

[33] *See* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976) (addressing The Pound Conference) (Sander envisioned a multi-door courthouse in which a screening clerk would channel each case to its optimal mode of conflict resolution, thus "fitting the forum to the fuss.").

European continent and other areas).[34] While numerous legal systems are mixed today, the starting line from which they have gravitated can still have an effect on the legal culture.[35] The comparison here is thus made carefully and is not meant to infer that cultures are exclusively inquisitorial or adversarial.

In the inquisitorial tradition, judges may actively participate in a fact-finding inquiry.[36] In Italy, whose legal system has inquisitorial origins,[37] judges cannot independently search for evidence. Yet they can order evidence to be brought forth (with some caveats specified in the law), order a technical expert opinion, or call witnesses that have not been invited by the parties yet mentioned by them if necessary to uncover the truth (though the latter practice is rare).[38]

Judges have a relatively active role in systems that have inquisitorial

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[34] *See* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1187 (2005). ("The models of adversarial and inquisitorial systems of justice are precisely that-models to which no actual legal system precisely corresponds since all legal systems combine both adversarial and inquisitorial elements. Nonetheless, such models are useful as Weber-ian ideal types for facilitating comparative analysis, and thus directing attention towards the latent tendencies within any actual legal system.").

[35] *Id.* The effect is not limited to legal culture, which itself affects other arenas. *See generally* Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, *The Economic Consequences of Legal Origins*, 46 J. ECON. LITERATURE 285 (2008) (giving an overview on the law-and-finance debate on the economic effects of common law and continental law traditions).

[36] *See* Chrisje Brants & Stewart Field, *Truth-finding, Procedural Traditions and Cultural Trust in the Netherlands and England and Wales: When Strengths Become Weaknesses*, 20(4) INT'L J. EVIDENCE & PROOF 266 (2016).

[37] Interview with leading scholar Andrea Proto-Pisani, Professor, Florence University, in Florence, Italy (Oct. 17, 2017), in which he emphasized that Italy's inquisitorial system has historically undergone change and imported elements from adversarial systems: The judge cannot look for evidence independently. He is limited to the submissions of the parties but he has the power of inspection—can go on the ground to see the state of the affairs—to order the exhibition of some evidence (books or documents; typically interpreted as allowed if the parties so request), and to require depositions from the parties to prove the facts. The judge almost never orders the presence of the parties in court in order to investigate them. The judge almost never calls upon the parties to ask them if additional evidence is needed.

[38] *See* Art. 118 C.p.c.; *see also* Art. 257 C.p.c.; For truth-finding in criminal cases, see Laurene Soubise, *Guilty Pleas in an Inquisitorial Setting. An Empirical Study in France*, 45(3) J. L. AND SOC'Y 398, 399 (2018) (arguing that it seems unacceptable in an inquisitorial system in which the research of the truth is based on an investigation that the truth could be based on a negotiation between parties).

origins. They are the sole authority in deciding the case, without a jury.[39] While the parties are expected to present their cases, they are for the most part not expected to resolve the conflict on their own.[40] The judge's fact-finding role in Italy is by no means of an ideal type, yet it is an important part of the process.[41]

In contrast, in systems with adversarial origins, judges generally manage the procedure as the parties bring forth their best scenarios, sometimes before a jury.[42] In general, the responsibility rests on the parties to provide adequate evidence to substantiate their case[43] (this is increasingly true in continental civil law countries today, which have incorporated this element into their legal systems). In the adversarial tradition, neither judge nor jury can initiate an inquiry.[44] Rather, the judge affirms or rejects the parties' contentions as brought forth by them.[45]

While this characterization is not clear-cut—and some shades of gray will be discussed below—in general one can say that the emphasis in inquisitorial systems is on the judge rather than on the parties, and on the truth rather than on party narrative. These distinctions may make the inquisitorial system, to some extent, less conducive to settlement than the adversarial system. Mediation and settlement constitute an agreement between the parties

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[39] With very few exceptions, the Corte d'Assise in Italy, which holds criminal trials in severe cases such as terrorism and murder, is composed of two professional judges and six lay judges selected from the people. *See* Diehm, *supra* note 31 (the introduction of jury trials and adversarial elements into inquisitorial countries)

[40] *See* Kessler, *supra* note 34; Grossi, *supra* note 19.

[41] *See* Grossi, *supra* note 19.

[42] *See* Cortes, *supra* note 22; *see also* Nancy S. Marder & Valerie P. Hans, *Introduction to Juries and Lay Participation: American Perspectives and Global Trends*, 90 CHI.-KENT L. Rev. 789 (2015) (It is important to note that the vanishing trial phenomenon in common law criminal and civil justice systems has led to a decrease in jury trials). *See* Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99 (2018); *see also* Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163 (2005).

[43] Kessler, *supra* note 34.

[44] *Id.*

[45] *See* Grossi, *supra* note 19, quoting Geoffrey C. Hazard, Jr. & Michele Taruffo, AMERICAN CIVIL PROCEDURE: AN INTRODUCTION 80, 81-2 (1993) ("Theoretically, the parties [in the adversarial system] bear the entire responsibility for presenting the law and the facts; the judge is obliged merely to affirm or reject the parties' contentions…Most other modern legal systems employ what is usually called the inquisitorial system, meaning only that the initiative rests with the judge for developing the facts of a case and the governing legal principles.") (This mention should be, of course, considered in light of the period of its formulation, but it can function as a valid basis for further elaboration).

rather than a verdict by the judge,[46] and a search for compromise does not always correlate with a search for complete clarity on the factual context.[47]

Further contributing to a lack of a settlement culture is the absence of a pre-trial discovery phase in the Italian legal system; the evidence is uncovered during the trial itself.[48] From the beginning of a proceeding and until the end of the evidentiary phase (just before the verdict is given) or until specific time limits expire, the parties are uncertain as to the evidence that the opposing party is going to present.[49] After the evidentiary phase, the judge decides which evidence is admissible,[50] and uncertainty may remain until this decision. In stark contrast, adversarial systems in the United States and England, for example, require parties to uncover their evidence at an early stage.[51]

The fact that most cases settle before trial in common law systems in general, underlines the importance of the revelation of information for the reaching of an agreement. It can be argued that the end of the preliminary evidentiary stage in a common law system is in a sense similar to the end of the entire continental trial: Parties in common law countries have much information and much to lose when pursuing trials, while parties in continental countries have access to the relevant information only when they are on the verge of obtaining a verdict at the end of the evidentiary stage.

Not surprisingly, Italy does not have a tradition of courts attempting to favour settlements, and the legal culture considers adjudication the preferable and best manner to solve conflicts.[52] The evaluation of judges does

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[46] *See* Francesco Paolo Luiso, *La conciliazione nel quadro della tutela dei diritti,* 58 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1201 (2004).

[47] *See* Francesco Paolo Luiso, *Diritto Processuale Civile—La risoluzione non giurisdizionale delle controversie*, Vol. V, Cap. III, Giuffrè (2019) (regarding the difference between the search for factual clarity and the search for compromise and dispute resolution in mediation,) [hereinafter *Diritto Processuale Civile*]; *see also* Ilaria Pagni, *Mediazione e processo nelle controversie civili e commerciali: risoluzione negoziale delle liti e tutela giudiziale dei diritti*, in LE SOCIETÀ 624 (2010) (stressing that, thanks to conciliation and other procedures to obtain a settlement agreement, the parties are able to autonomously manage the so-called *res litigiosa* and expand the object of the dispute further than what would be considered during a trial).

[48] *See* Grossi, *supra* note 19.

[49] *See* Grossi, *supra* note 19, at 271.

[50] *Id.*

[51] *See* Brittany K. T. Kauffman, *Initial Disclosures: The Past, Present, and Future of Discovery*, 51 AKRON L. REV. 783, 816 (2017); *see also* UNITED KINGDOM MINISTRY OF JUSTICE, *Pre-Action Protocols—Civil Procedure Rules* (2015), https://www.justice.gov.uk/courts/procedure-rules/civil/protocol; 6 Fed. R. Civ. P. 16(c).

[52] Conte, *supra* note 13; Lucarelli & Conte, *supra* note 13; Matteucci, *supra* note 13.

not include the number of cases that they settle.[53] Before the introduced reforms began to take hold, Italy had practically no settlement culture, though parties were free to settle if they so wished. As one scholar noted, "settlement procedure still remains a 'dead' instrument that is rarely used by the parties."[54] At the other extreme, the prevalence of a settlement culture in common law countries has led to the observation that "[i]n common law jurisdictions, settlement is perceived to be the best possible outcome of a dispute," as well as one that saves time and expenses.[55] In England and Wales, this line of thinking led to the Woolf Reforms, which provided strong incentives to reach settlement, and defined legal proceedings as a last resort.[56]

B. *Hybrid Judicial Roles*

Despite the general difference in judicial roles in both types of legal cultures, when observing areas of "hybridization" between systems with inquisitorial and adversarial origins, the judicial role takes a prominent place.[57] The *pre-trial judge* in the United States has been noted, and at times criticized, for an active style reminiscent of that of the continental civil law judge. One scholar said: "Judges are taking a more active role and discretionary approach to pretrial case management. On some occasions, United States federal judges may have more discretion than Italian judges because their powers are not regulated."[58]

While in the United States, pre-trial judges—often the only judges to see a case[59]—may take a similar approach to that of Italian judges in terms of

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[53] Mary L. Volcansek, *Appointing Judges the European Way*, 34 FORDHAM URB. L.J. 363 (2007).

[54] *See* Grossi, *supra* note 19, at 230.

[55] *See* Cortes, *supra* note 22, at 42.

[56] *See generally* LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT (1996), https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm.

[57] *See* Anna E. Carpenter, *Active Judging and Access to Justice*, 93 NOTRE DAME L. REV. 647, 708 (2017); *see generally* Vincenzo Varano, *Some Reflections on Procedure, Comparative Law, and the Common Core Approach*, 3 GLOBAL JURIST. [i] (2003); *see also* Adrian A. Zuckerman, *Justice in Crisis: Comparative Dimensions of Civil Procedure*, *in* CIVIL JUSTICE IN CRISIS 47 (Adrian A. Zuckerman ed., 1999).

[58] *See* Grossi, *supra* note 19, at 215 (Explaining that, according to Fed. R. Civ. P. 16(c), judges "may take appropriate action, with respect to . . . settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule.").

[59] William P. Lynch, *Why Settle for Less: Improving Settlement Conferences in Federal Court*, 94 Wash. L. REV. 1233 (2019); John C. Cratsley, *Judicial Ethics and Judicial Settlement Practices: Time for Two Strangers to Meet*, 21 OHIO ST. J. DISP. RESOL, 569 (2006).

proactiveness.[60] It is important to note that they do so to achieve a different goal. In general, judges in systems with adversarial origins use this approach to bring the parties to settle while judges in systems with inquisitorial origins use the approach to verify the facts of the case towards a final judgment. Accordingly, in adversarial systems the active approach taken by judges may include placing pressure on parties to forego what is described as a costly and at times inefficient process.[61]

In addition to taking a more active role, judges in adversarial cultures have also been observed helping the cause of truth in the growing number of *pro se* cases, and judges in the United States and England have been observed helping the unrepresented party to make its case.[62] On an institutional basis, the adversarial legal system is edging towards the inquisitorial system regarding a search for factual clarity; several courts in the United States have recently begun experimenting with a pilot program for mandatory initial discovery that requires revelation of evidence beyond the parties' interests before the commencement of discovery requests for the pre-trial stage.[63]

The recent reforms in Italy bring it closer to adversarial culture both on the judicial and institutional level, as will be discussed in the next sections.

C. *Impetus for Change in Italy*

Italy has incorporated adversarial culture in its recent reforms to

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[60] The inquisitorial nature of the pretrial judge has been noted before. *See* Resnik., *supra* note 1 at 445 (criticizing managerial powers as a new activism, stating "Our society has not yet openly and deliberately decided to discard the traditional adversarial model in favor of some version of the continental or inquisitorial model."); Thomas D. Rowe Jr., *Authorized Managerialism under the Federal Rules—and the Extend of Convergence with Civil-Law Judging*, 36 Sw. U. L. REV. 191 (2007).

[61] *See* Sela et al., *supra* note 5.

[62] *See* Carpenter, *supra* note 57 (describing such judicial practices in the United States); *see also* John Sorabji, *Austerity's Effect on English Civil Justice*, 8 ERASMUS L. REV. 159, 166 (2015) (examining practices in England and Wales) ("Necessity, in the absence of lawyers, has therefore meant that courts have had no choice…they have had to start to move away from the traditional, adversarial, idea that the judge should play no part in evidence-gathering, issue identification, or in examining parties or witnesses at trial.").

[63] *See* David Rosenberg, Anne Brown, Jaehyun Oh & Benjamin Taylor, *A Plan for Reforming Federal Pleading, Discovery, and Pretrial Merits Review*, 71 VAND. L. REV. 2059, 2059, 2111 (2018) ("We propose a fundamental restructuring of the federal civil pretrial process to address its great expense and unreliability in resolving cases on their merits—problems largely attributable to discovery. The proposed reforms establish an affirmative-disclosure mandate that sharply reduces the role of discovery by transferring most of the parties' burden of fully revealing discoverable matter, favorable and unfavorable, to their pleadings.") (Participating in the Mandatory Initial Discovery Pilot are judges of the Northern District of Illinois (beginning 2017), the District of Arizona and the Southern District of Texas Chief Judge Lee H. Rosenthal).

encourage modes of dispute resolution other than adjudication. This development was largely a result of the notorious length of trial in Italy, and an extreme backlog of cases.[64] In 2010, the average duration of trials in Italy in front of the Court of First Instance was 493 days, compared to the EU's overall average of 267 days,[65] and much longer if all three instances of adjudication are considered.[66] As in adversarial systems, the unmanageable caseload raised the need for alternative forms of dispute resolution. Before the reforms, the backlog reached nearly six million civil cases (5,700,105 according to the Ministry of Justice);[67] the dire situation permeated the whole legal system, both civil and criminal. The system was slow and very expensive, particularly given that every year the state had to pay millions of euros to citizens as compensation for the violation of L. 89/2001 (so called "Legge Pinto") that provides for a reasonable duration of trial.[68] Italy was condemned several times by the European Court of Justice for violating principles of due process due to the length of trials.[69]

In 2008, the European Union adopted a Mediation Directive, ("the Directive") specifying minimum requirements for mediation training and implementation in EU countries.[70] The Directive resulted from the rising awareness to the benefits of ADR (e.g., dealing with the parties' underlying interests), the need for an efficient legal system to facilitate business transactions between EU countries, and the desire to ensure adequate access to justice in EU countries.[71] Among the principles set out in the Directive was

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[64] *See* EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE, CEPEJ STUDEIS NO. 26, 250 (2018), https://rm.coe.int/rapport-avec-couv-18-09-2018-en/16808def9c.

[65] *Id.*

[66] *Id.*

[67] MINISTERO DELLA GIUSTIZIA, https://www.giustizia.it/giustizia/it/mg_1_14_1.page?facetNode_1=0_10_37&facetNode_2=1_5_2&contentId=SST993884&previsiousPage=mg_1_14 (last visited June 3, 2021).

[68] *See* Giovanni Carlo Bruno, *Human Rights,* 12 THE ITALIAN YEARBOOK OF INTERNATIONAL LAW ONLINE 273 (2002).

[69] *See* Italy v. Ferrari, (No. 3440/96) Eur. Ct. H.R. Page Number; Bottazzi v. Italy (No. 34884/97), Eur. Ct. H.R. 15 (1999); Di Mauro v. Italy (No. 4256/96), Eur. Ct. H.R. 31 (1999); A.P. v. Italy (No. 35265/97), Eur. Ct. H.R. Page Number (1999) (holding that systemic delays in the Italian judicial system constituted an administrative practice that is incompatible with the Convention); *See also* Apicella v. Italy, (No. 64890/01), Eur. Ct. H.R. Page Number (2004) (holding that the compensation provided by Italy for undue length of proceedings was "derisory").

[70] *See* EUROPEAN PARLIAMENT, Directive 2008/52/EC, Council of 21 May 2008 (describing certain aspects of mediation in civil and commercial matters).

[71] *See* Jacqueline M. Nolan-Haley, *Is Europe Headed down the Primrose Path with Mandatory Mediation*, 37 N.C.J. INT'L L. & COM. REG. 981, 982 (2012) ("As a result of systemic problems in accessing justice, the alternative dispute resolution (ADR) movement has experienced a steadily growing presence in both civil and common law jurisdictions.").

the right of every judge to invite parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case.[72]

The Directive was enforced in EU countries to varying extents. In Italy, where there was a strong preference for adjudication of disputes over any other means, the legal culture ran counter to such a provision (though some mediation initiatives were previously taken, including mandatory mediation before trial for labor disputes; its failure led to subsequent cancellation of the requirement).[73] The Directive did not make ground in the country until two years later when, under pressure by the EU for the country's backlog of cases, Italy introduced reforms that finally implemented the Directive's stipulations into its legal system. These reforms aimed to lessen the caseload by incorporating settlement practices.[74]

II. LEGISLATIVE REFORM IN ITALY

The legislative reforms introduced by Italy due to economic pressure and condemnations by the European Union were far from symbolic. They covered a wide range of areas, and included a highly controversial mandatory mediation component. The judicial role was changed to include conciliation practices and referral to ADR.

In 2010, mediation was declared mandatory for a variety of civil matters as a prerequisite to initiating court proceedings;[75] in addition, judges were permitted to suggest mediation to parties. The changes were introduced by Legislative Decree No. 28/2010, whose explanatory report pointed to the need to end violations of the reasonable time requirement for a fair trial as specified in Article 6(1) of the European Convention on Human Rights and as specifically recognized by the Italian Constitutional Court.[76]

As renowned experts have noted, the mandatory mediation component, while incongruent with the voluntary nature of ADR, may have been needed to initiate a cultural transition to mediation.[77] This attempt to change the legal culture caused an uproar from Italy's lawyers, who perceived

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[72] *See generally* EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ) REPORT, *supra* note 50.

[73] *See* Cominelli, *supra* note 26, at 8; *see also* Conte, *supra* note 13, at 181.

[74] *See* Cominelli, *supra* note 26, at 8; *see also* Conte, *supra* note 13.

[75] *See* Legislative Decree, 4 March 2010, n. 28, G.U. Mar. 20, 2010, n. 69 (It.). However, it must be noted that even before Legislative Decree 28/2010, mediation was a mandatory step for certain disputes, in particular in relation to commercial disputes between two or more companies. *See* Ilaria Pagni, *La mediazione nelle controversie commerciali*, 10(1) ANALISI GIURIDICA DELL'ECONOMIA 17 (2011).

[76] *See* Court Costituzionale, n. 436, 19/12/2006.

[77] *See* Conte, *supra* note 13, at 182.

the transition as a threat to their livelihood. Italy's National Lawyers Union called for a national strike.[78] Appeals against the constitutionality of Legislative Decree No. 28/2010 were made to Italy's Constitutional Court, which overturned mandatory mediation in 2012, stating that the government had overstepped its authority by introducing mandatory mediation.[79] The compulsory aspect set out in Legislative Decree No. 28/2010 seemed to hinder the voluntary element of mediation.[80]

As a result, a new decree was introduced, Legislative Decree No. 69/2013, which made certain adjustments and additions to the previous one: one introductory informative mediation meeting was required—with the compulsory accompaniment of lawyers—in a smaller scope of civil disputes. The list includes joint ownership of real estate and rental leases, division of assets, inheritance and family agreements, medical malpractice liability, damages from libel, insurance, banking, and financial contracts.[81] Completion of mediation proceedings was limited to three months rather than four, as previously stipulated.

This time, though, judges were authorized to *order* the parties to carry out a first mediation session during court proceedings in other civil matters as well, and this mediation attempt would be a condition for the possible continuation of proceedings.[82] In addition, judges were allowed to convene a conciliation hearing and demand that the parties (rather than just their lawyers) be present for direct questioning by the judge.[83]

Moreover, judges were authorized to make a judicial conciliation proposal at any time from the first hearing until the last evidentiary hearing.[84] Until this reform was introduced, judicial settlement proposals made without specific authority under law were grounds for the judge's recusal from the case due to concerns of anticipating the verdict.[85] While initially ignored, recent cases demonstrate that in some jurisdictions judges have begun to use the

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[78] Cominelli, *supra* note 26 at 6.

[79] *See* Francesco Paolo Luiso, *L'eccesso di delega della mediazione obbligatoria e le incostituzionalità consequenziali* CORR. GIUR 257 (2013); Corte Costituzionale, 272/2012, G.U. 12/12/2012. For a in-depth analysis of the consequences of the judgment for the mediation procedure in Italy, see Ilaria Pagni, *Gli spazi e il ruolo della mediazione dopo la sentenza della Corte Costituzionale 6 dicembre 2012, n. 272*, CORR. GIUR 262 (2013).

[80] *Id.*

[81] *See* D.L. 28/2010 (It.).

[82] *Id.*

[83] *See* Art. 185 C.p.c. (It.).

[84] *See* Art. 185-*bis* C.p.c. (It.).

[85] Attempts to introduce judicial conciliation proposals were made in the past yet were repealed. *See* Francesca Ferrari, *The Judicial Attempt at Conciliation: The New Section 185-bis of the Italian Code of Civil Procedure*, 2 RUSS. L.J. 80, 93 (2014).

conciliation proposal more frequently.[86]

During the presentation of evidence, judges were authorized to send the parties to a court-appointed technical consultant who was given the authority to help them settle the dispute.[87] This could happen after the parties have presented widely divergent expert reports, for instance. The court-appointed expert, "before proceeding with the filing of the report, attempts, where possible, the conciliation of the parties."[88]

Many new measures and resources have been devoted to the goal of shortening the duration of trials and eliminating the backlog of cases in Italy. These include human resources (for the first time in Italy, law scholars aside judges), e-filing, which was introduced in 2014 and has seen increasing usage,[89] a reorganization of the judiciary's internal structure (with the creation of the "office for the trial," *ufficio per il processo*), and legislative activity and reforms of the Code of Civil Procedure.[90] Special legislative attention has been given to the implementation of conflict resolution instruments that are alternative to adjudication.[91] These measures may have been encouraged by an awareness within the government that the efficacy and efficiency of processes related to damage recovery, credit recovery, and insolvency procedures heavily influence the overall perception of the country as a place worthy of investment.[92]

While the possibility of changing the legal culture in Italy seemed

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[86] This study presents research data that include judicial conciliation in the Florence Court. A survey at the Bari Court found use of judicial conciliation. *See* Giovanni Matteucci, *Mediacao e Judiciario na Italia* 2019, 21 REVISTA ELETRÔNICA DE DIREITO PROCESSUAL 106 (2020).

[87] *See* Art 696 C.p.c. (It.).

[88] *Id.*

[89] Pier Carlo Padoan, *Italy's justice system has quite a long road ahead but already scores better,* OECD (Oct. 9, 2017), https://oecdecoscope.blog/2017/10/09/italys-justice-system-has-quite-a-long-road-ahead-but-already-scores-better-the-italian-view/.

[90] Simone Busetti, & Vecchi Giancarlo Vecchi. *Process Tracing Change Management: The Reform of the Italian Judiciary*, INT'L J. PUBLIC SECTOR MANAGEMENT 566 (2018).

[91] *See* D.L. 162/2014 Art. 2–11 (It.) (This introduced mandatory assisted negotiation and the possibility for both parties to jointly ask the judge for arbitration at any moment during the trial. Yet arbitration and assisted negotiation do not seem, as of yet, adapted to the workings of the legal system. The government is also active in reforming the criminal code, trying to devise and implement instruments of restorative justice and decriminalize types of minor offences as much as possible, providing for monetary sanctions instead of criminal ones.).

[92] *See generally* World Bank Group, *Doing Business 2019 and 2009, Enforcing Contracts and Resolving Insolvency,* INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT (2019) (reinforcing the improvement in Italy's ranking).

uncertain at first, and experts lamented that some articles of reform were not being implemented,[93] there is a growing consensus that mediation has entered the legal mainstream.[94] According to the Ministry of Justice, mediation conducted by a judge's order, which in 2011 accounted for only 1.7% of the total mediation procedures (700 out of 40,161), reached 13.4% (20,835 out of 155,457) in 2017—an increase of 387%.[95] The numbers saw a slight decrease in 2018.[96] The number of voluntary mediations has also increased, representing around 10% of the mediation procedures.[97] Mandatory mediation is required for about 8% of civil cases and had a 43% success rate for parties that continued beyond the first preliminary meeting (less than half proceed beyond the preliminary hearing, meaning that the overall success rate is around one in five cases reaching a preliminary meeting).[98]

Due to the reforms, Italy's standing as a place to do business in the EU has improved.[99] The increased efficiency of legal proceedings is centrally credited with this improvement. In 2017, the Italian government adopted Legislative Decree 50/2017, converted in Law 96/2017, stabilizing the compulsory preliminary mediation meeting.[100] Thus, it "abolished its transitory and experimental nature, and confirmed the value of the reform."[101]

The incentives for litigants to use mediation over the regular trial, according to mediators in Italy that we interviewed, are related to predictability, the ability to control the case's outcome,[102] and a speedy result,

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[93] *See* Matteucci, *supra* note 13, at 204 ("It is easier and quicker to issue a law than to change a habit; the issue here is culture!").

[94] *See* Cominelli, *supra* note 26.

[95] *See* Italian Ministry of Justice, CIVIL MEDIATION LEGISLATIVE DECREE 28/2010 STATISTICS FOR THE PERIOD JANUARY 1ST–DECEMBER 31ST 2017 (2018), https://webstat.giustizia.it/Analisi%20e%20ricerche/Civil%20mediation%20in%20Italy%20-%20Year%202017%20(ENG).pdf.

[96] *Id.*

[97] *Id.*

[98] *Id. See also* Raffaele Aveta, *The Italian Model of Civil and Commercial Mediation* (2017), https://ebuah.uah.es/dspace/bitstream/handle/10017/28939/italian_aveta_AFDUA_2016.pdf?sequence=1.

[99] "Quality of Judicial Process" is a measure in the World Bank Report. *See* World Bank, *Doing Business Report,* DOING BUSINESS 2019 at 26 (showing data up to mid-2018). http://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB2019-report_web-version.pdf; *Cf. Doing Business* 2012 at 7–9 (showing data up to mid-2011). https://www.ihk-krefeld.de/de/media/pdf/international/doing-business/italien-doing-business-in-italy-2012.pdf.

[100] Cominelli, *supra* note 26 at 1.

[101] *Id.* at 3.

[102] *See* R. Field, *Mediation Praxis: The Myths and Realities of the Intersection of*

compared to years of waiting in regular legal proceedings. It also promises significant savings in legal costs, not only of the court fees but also of experts who charge less if presenting evidence in a mediation process rather than in court.[103]

Lawyers, mediation's main detractors at the outset of the reforms, have become movers of mediation market; the choice of a mediation agency for their represented clients has a direct impact on which agencies prosper.[104] Notably, mediators are not necessarily lawyers but are often mediation professionals, who, according to their own accounts, allow for a more holistic needs-centred mediation process. A recent study backs up this claim, indicating that the common mode of mediation in Italy is facilitative rather than evaluative, while another rather common mode is transformative.[105] In other words, mediation in Italy may have developed as a true alternative, as imagined by the founders of the ADR movement.[106] This interesting twist

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Mediator Neutrality and the Process of Redressing Power Imbalances 3(1) ADR BULLETIN 16 (2000) (regarding the necessary neutrality and fairness of the mediator); *but see* K. Gibson, L. Thompson & M. Bazerman, *Shortcomings of Neutrality in Mediation,* 12 NEGOTIATION J. 1 (1996).

[103] The possibility to avoid further expenses and render the possible settlement agreement particularly valuable for both parties is enhanced by Art. 12 D.lgs. 28/2010 (It.). *See* Mauro Bove, *L'accordo di conciliazione: efficacia ed esecutività nelle legislazioni nazionali assunte in attuazione dell'art. 6 della direttiva n. 52 del 2008*, RIV. TRIM. DIR. PROC. CIV. 919 (2013), https://www.judicium.it/wp-content/uploads/saggi/505/Bove.%20Accordo.pdf.

[104] Regarding the key role of the legal professional during the choice of an alternative dispute method, specifically in the context of transnational commercial contracts, *see* Fabio Bortolotti, *Il Contratto Internazionale – Manuale teorico pratico*, II Edition, Wolters Kluwer, Cedam, 115, 116 (2017) (stressing that "if the mediation process succeeds, it can be considered as an alternative method to other dispute resolution procedures. Therefore, once an agreement is reached, there will be no further reason to try arbitration or to go in front of a Court.").

[105] *See* Luigi Cominelli & Claudio Lucchiari, *Italian Mediators in Action: The Impact of Style and Attitude*, 35(2) CONFLICT RESOL. Q. 223, 234 (2017) (explaining: "This distribution seems to contradict anecdotal experience, according to which most mediations are evaluative rather than transformative [Barr, 2012], as well as the literature which established the prevalence of goal-oriented mediators over relationship-oriented mediators [Kressel et al. 2012].").

[106] For the loss of the essence of mediation as a genuine alternative to adjudication in the US legal culture and together with the spread of ADR *see generally* Nancy A Welsh, *The Thinning Vision of Shelf-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization*, 6 HARV. NEGOT. L. REV. 1 (2001); Jacqueline Nolan-Haley, *Mediation: The new arbitration*, 17 HARV. NEGOT. L. REV. 61 (2012).

beyond efficiency considerations[107] and co-optation which many times characterize institutional ADR, carries intersecting comparative insights which will be further discussed (Parts III and IV).

Despite these changes, it is important to note that Italy is still very much in a period of transition. The figure below, from the 2018 European Justice Scoreboard,[108] shows that Italy (depicted as IT) still has the highest number of pending cases (even in comparison to countries that have a larger population, such as France and Germany), though the number has drastically decreased (Figure 1):

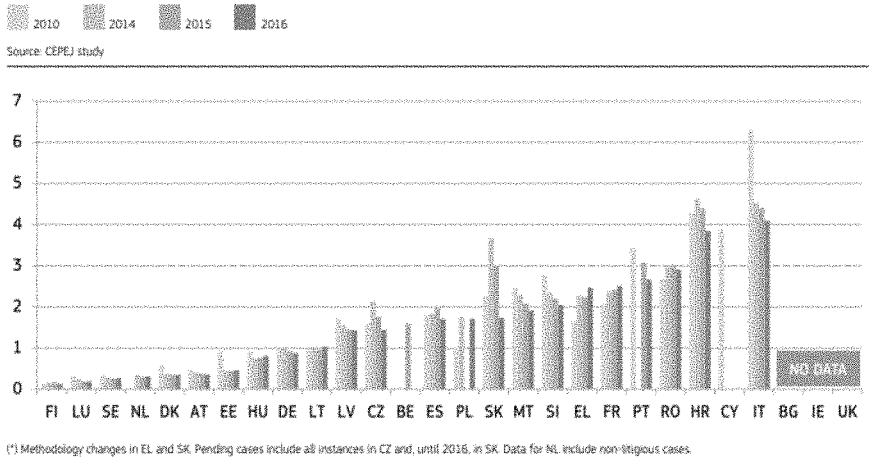

Figure 1. Number of pending cases according to EU country. Source: 2018 European Justice Scoreboard

Since many instruments aimed at favoring judicial settlement have been introduced only recently (2013-2014), there is still very little available data on their efficacy, and the use of JCR practices currently seems sporadic. Much has to be done in terms of promoting a shift in the judicial and legal cultures of magistrates and lawyers, as well as their training.

However, it is now widely agreed that change has occurred in Italy. In March 2021, the Italian Minister of Justice Marta Cartabia appointed a committee to reform civil proceedings to reduce trial rates and increase

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[107] To demonstrate the transformative flavor of mediation practiced in Italy, one interviewed mediator, (Rachele Gabellini, 18.4.2019, ADR Center, Rome, Italy) related a case in which a soldier dropped a case for damages against the military when: a) it became apparent during the mediation that the military dentist who had allegedly committed malpractice was suffering and b) military representatives, for the first time, clarified that he could be re-enlisted to active duty, responding to his non-financial needs.

[108] European Commission, *European Justice Scoreboard,* EUROPEAN COMMISSION, 11 fig.8 (2018), https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2018_en.pdf.

efficiency.[109] The programmatic lines of the Minister, which directed the committee's work, enhance the fundamental role of mediation, to be understood as consensual justice alongside adjudication. The committee's reform proposal is currently filed in Parliament, waiting for the beginning of parliamentary work.[110]

One court that has made an active effort to implement the reforms from the outset—through mediation education—is the Florence first-instance court.[111] The Milan first-instance court and the Court of Ostia (a division of the Court of Rome) made similar efforts.[112] We initiated a study in the Florence Court to examine how the Italian legal culture might incorporate ADR and judicial conflict resolution (JCR) practices.

III. METHOD: ANALYZING JUDICIAL REFORM IN THE FLORENCE COURT

This study is part of a comparative study into judicial conflict resolution (JCR) practices in three states—Italy, Israel, and England and Wales. In the preliminary stage of the research, our team set out to measure the mode of case disposition in nationwide docket data. We examined the validity of the data by comparing them to actual case documents in a pilot study. It soon became apparent that mapping of the settlement phenomena based solely on nationwide docket data was unfeasible since the information in the docket data did not reflect JCR activities that we traced in the case documents. Thus, based on findings of the pilot study, we decided to expand the study to glean and code relevant data from civil and commercial cases in each research country. In Italy, we focused on the Florence first-instance court.

The choice of the Florence first-instance court relied on an understanding that significant effort would be needed to promote a cultural shift in the legal profession, mainly amongst lawyers and judges.[113] According to a preliminary study that we had conducted, courts and local Bars that were

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[109] Redazione, *Processo civile, la relazione finale della Commissione Luiso*, Ministero della Giustizia (June 3, 2021), https://www.gnewsonline.it/processo-civile-la-relazione-finale-della-commissione-luiso/.

[110] *See generally*, Francesco Paolo Luiso, *Commissione per l'elaborazione di proposte di interventi in materia di processo civile e di strumento alternativi*, MINISTERO DELLA GIUSTIZIA (2021), https://www.giustizia.it/cmsresources/cms/documents/commissione_LUISO_relazione_finale_24mag21.pdf.

[111] *See* Paola Lucarelli, *Mediazione su ordine del giudice a Firenze – prassi, problemi e linee guida di un modello* (UTET giuridica 2015).

[112] Giovanni Matteucci, *Civil Mediation, How to Kick-Start It; the Italian Experience*, 19 REVISTA DA EMERJ 78 (2017).

[113] *See* Matteuci, *supra* note 13.

invited by universities to work on the dissemination of ADR culture (e.g., Florence and Milan) seemed to be relatively advanced in implementing new ADR instruments. The Florence first-instance court (the Florence Tribunal), which collaborated with Florence University scholars to take active steps to incorporate settlement practices, thus seemed to be a good place to focus the research (and, indeed, the Florence model is now being replicated in other parts of the country).[114] We decided to examine whether the new legislation was able to make significant inroads in a court engaged in this type of effort.

The quantitative portion of the Florence Court study (a court docket analysis) spans the years 2013–2016, on the heels of the reforms in Italy, and the qualitative portion (court observations and interviews) took place in 2018.

The Florence first-instance court instituted two programs—*Simple Justice and Nausicaa* (I and II)—to spread mediation awareness and tools to judges, lawyers, and the general public.[115] Judges are assisted by the program's interns (graduate law students) who analyse cases before or during the trial,[116] assessing the characteristics that might lend them suitable for mediation. These characteristics are written down so as to be easily available to the judge if he/she decides to issue a mediation order (a mediation order must be built on tangible basis).[117] When judges consider whether to send cases to mediation,

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[114] *See* Regione Umbria, https://www.regione.umbria.it/notizie/-/asset_publisher/54m7RxsCDsHr/content/giustizia-condivisa-progetto-per-il-tribunale-civile-di-perugia?read_more=true (last visited June 3, 2021) (describing a parallel project in Perugia Regione Umbria – Regione Toscana); *Mediazione dei conflitti, il progetto Jacobea*, FACEBOOK (Sept. 18, 2020), https://hi-in.facebook.com/UNIFIOFFICIAL/videos/mediazione-dei-conflitti-il-progetto-jacobea/2765392563729248/

(describing an equivalent project called "Jacobea" in Pistoia).

[115] The Laboratorio Un Altro Modo of the Department of Legal Sciences of the University of Florence presented the Court of Florence, the Metropolitan City of Florence, the Chamber of Commerce, the Fondazione CR, OCF Organismo Conciliazione Firenze, the Mediation Body for Labor Consultants, and the Mediation Body for Surveyors with these projects to support judges. *See generally* UN ALTRO MODO, https://www.unaltromodo.org/ (last visited June 3, 2020). The head of Laboratorio Un Altro Modo coordinated the project, first by training the university research fellows about mediation referred by the court and then by sharing with them the development of guidelines on the study of case files, the selection of lawsuits that have indicators of mediation potential, the preparation of data sheets on the controversy useful for the judge who studies the matter, the ongoing communication of data to monitor such support, as well as an analysis of the impact that the project produces in the professional and civil society.

[116] *See* Lucarelli *supra* note 111; *see also* Redazione, *"Giustizia semplice 4.0" vine premio "PA Sostenibile 2019,"* CONTRORADIO, (May 29, 2019), https://www.controradio.it/giustizia-semplice-4-0-vince-premio-pa-sostenibile-2019/ (describing the process "simple justice").

[117] *See* Lucarelli *supra* note 111.

they have in front of them extensive reports set out by interns.[118] They are free to make changes to them (and as we observed in the courtroom, they do)—but they have a prepared analysis that saves time, raises awareness to the aspects of the cases that are conducive to mediation, and allows for a first draft of a possible mediation order (or a basis on which to call the parties to conciliate).[119]

In addition, judges were invited to meetings aiming to stimulate discussion on the needs and problems they faced in litigation management and also to understand which typical characteristics of conflicts and recurrent matters might be appropriate for mediation.[120]

The Florence first-instance court is a particularly interesting court for the study of the change to a more settlement-oriented culture and may be instructive as to where the current trend is headed.

A. *Multi-Pronged Approach*

The study in the Florence first-instance court included a statistical analysis of cases through case documents during the years 2013–2016 as well as courtroom observations and interviews of judges during October–December 2018. A random sample of 402 cases was drawn out of 4,053 cases opened in the Florence first-instance court between 2011–2016, with 99% of them closing during 2016. The sample size amounts to approximately 10% of civil cases that terminated in the selected courts during that time; its reported sampling error is below 5%. A stratified sampling method was used to ensure that the sample accurately and proportionally represents the population of terminated civil cases of original jurisdiction.[121]

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[118] *Id.*

[119] On the innovative model in Florence, *see* World Bank Group, *Doing Business 2019: Comparing Business Regulation in 190 Economies - Economy Profile of Italy*, WORLD BANK GROUP, 35 (2020), http://documents1.worldbank.org/curated/en/636031575000527315/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies-Economy-Profile-of-Italy.pdf (regarding the enforcement of contracts:

"Starting in 2013, Florence became a pilot location for mediation services. Scholars from the University of Florence started collaborating with the local district court through a project called *Nausicaa*. The program brought together judges, lawyers and academics to develop learning modules aimed at helping the court promote alternative dispute resolution as a means of reducing historical case backlogs.").

[120] Lucarelli, *supra* note 111.

[121] *See* Lucarelli et al., *Court of Florence Dataset*, ZENODO (June 13, 2021), https://zenodo.org/record/4939336#.YOBcsi9h0l4. The data was collected and coded by Dr. Elisa Guazzesi, and supervised by Professor Paola Lucarelli. It was also supervised and processed by Dr. Ayelet Sela and Dr. Dana Rosen from the JCR project. Access to data

The detailed features of the 402 sample cases were coded based on case documents (protocols) and data in electronic dockets. The goal of the project was to study the sample of court files by closely reviewing the case documents in order to collect case characteristics, outcomes (including settlements/mediation orders, contested judgments, etc.), and the specific JCR activities that were evident in the files.

The case-coding project was complemented by 55 trial observations for which we received special permission from the court. (Trials are conducted in judges' chambers and are not open to the public). We also conducted interviews with eight judges. The Florence first-instance court is composed of 85 judges, active in both criminal and civil areas of law. One of the judges whose hearings were observed was also interviewed. The aim of the interviews and observations was to deepen our understanding of the docket study's findings, to gain insight of judges' perception of their roles under the recent reforms, and to observe how JCR was conducted in real time in a continental civil law culture, since, as mentioned previously, judicial settlement activities often take place off the record.[122]

We conducted the observations and interviews synchronously with the quantitative analysis, and this allowed "cross-fertilization" and a more informed analysis of the findings.[123]

The cross-fertilization of findings allowed us to define a category of "Probable Settlement." Court observations and interviews with judges showed that cases have probably settled if parties do not return to trial after the judge has deferred the trial to allow for negotiation of a compromise or mediation.[124] According to Italian law, if both parties do not appear for trial, the judge must set a date for another hearing; if the parties do not come to the second hearing, the case is terminated.[125] One of the judges told us: "Article 309 C.p.c is often a disguise for settlement, since parties do not want to be taxed for their agreement."[126] The following interactions documented in our court observations are examples illustrating this understanding to be commonplace:

1) The defense attorney says: "Your honor, we are here, but the parties have almost reached an agreement outside, we would like to ask you if you could fix another hearing." The judge answers: "Yes, I remember the

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was made possible due to an agreement with the Court of Florence. The files are not open to the public yet. The coded database can be accessed through the link provided.

[122] *See* Resnik, *supra* note 1.

[123] 12 interviews and 55 observations were carried out at the Florence Court in the years 2016 and 2019 as part of the JCR Florence and the JCR research projects.

[124] *See Diritto Processuale Civile*, *supra* note 47, at 86–102 (regarding the discipline of negotiation in Italy).

[125] Article 309 C.p.c. (It.); Art. 181 C.p.c. (It.).

[126] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (May 9, 2019).

parties were willing to agree. But I will give you a very short deferment." To which the attorney replies: "The parties will sign an agreement on Friday. You will not see us anymore." The judge replies: "Please send an email if the agreement is signed." This type of interchange repeats itself throughout the observations.

2) During a courtroom observation, the parties do not show up. It is 1 PM, and they should have appeared at 12:40. The judge calmly types at his computer, then says (to the researcher): "Nobody will appear at this hearing because they have accepted my conciliation proposal."

In line with this understanding, we introduced a category, "Probable Settlement," into our quantitative analysis of court documents, whereby a case is adjourned until a later date to enable negotiation, mediation, or consideration of an agreement proposal, and the parties do not appear at the two subsequent hearings.

Though the difference between "conciliation" and "settlement" is negligible,[127] as the two terms are often used interchangeably in the Italian justice system, we do differentiate between them and acknowledge the difference between concessions made by the parties and submitted to the judge and proposal offered by the judge and imposed upon the parties. We set them apart according to the terminology used by the judge referred to in the study.

During October–December 2018, with the continuation and even expansion of reforms in the Florence Court, we conducted the qualitative portion of the study, conducting interviews with eight out of 85 judges in the Florence Court and conducting more than 50 courtroom observations.

IV. RESULTS OF COURT DOCKET ANALYSIS, COURTROOM OBSERVATIONS, INTERVIEWS

A. *Judicial Conflict Resolution (JCR): Forms, Frequency and Association with Settlement*

1. SIX MODES OF CASE DISPOSITION

All in all, we distinguished between six modes of case disposition: 1) Judgment on the merits 2) Conciliation 3) Settlement 4) Probable settlement (as explained in the previous section) 5) Lack of prosecution (resulting in

[127] *See* Ferrari, *supra* note 85, at 90. While noting that some scholars view the terms as synonymous, indicates a difference ("[W]hile the settlement proposal arises from the petition of parties and reaches a negotiated solution involving reciprocal concessions; the conciliation proposal aims to achieving a solution acceptable to both parties which, one might say, is independent from the respective claims and pursue the satisfaction of the interests at stake.").

termination of the case) 6) Other.

Findings portrayed in Figure 3 below show that judgment on the merits occurs in 42% of the cases. The percentage of cases disposed through conciliation, settlement, and probable settlement is 46%. The probable settlement category is a reasonable interpretation, yet even if one does not accept its full viability, it constitutes a category in which the trial has been terminated without judgment. *In other words, in the Florence Court, 42% of cases decided by adjudication and 46% of cases "vanish" in the sense that they settle or are resolved through other means*. It should be noted that the rates may vary among the Sections of the Florence first-instance court, as these findings were not analyzed according to Section but rather span the whole gamut of Sections of the court.

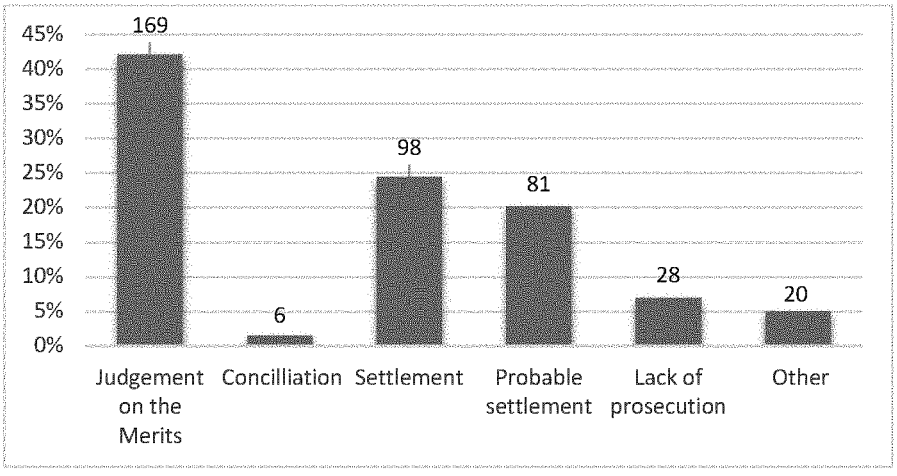

Figure 3. Modes of disposition of civil cases. N=402

2. *SIX MODES OF JCR PRACTICES*

JCR practices appeared in 158 of the 402 cases (39.3%). Since JCR often occurs off the record, the frequency is probably higher (especially for practices such as encouragement, which do not require reference to regulation). We found use of six main JCR practices in these cases (Figure 4): 1) offering of a judicial conciliation proposal,[128]2) conciliation hearing with the presence of the parties,[129] 3) issuing a mediation order, 4) appointment of a technical expert with conciliation authority,[130] 5) suspension for

[128] Art 185-*bis* C.p.c (It.).
[129] Art 185 C.p.c. (It.).
[130] Art 696-*bis* C.p.c. (It.).

negotiations,[131] and 6) encouragement.[132]

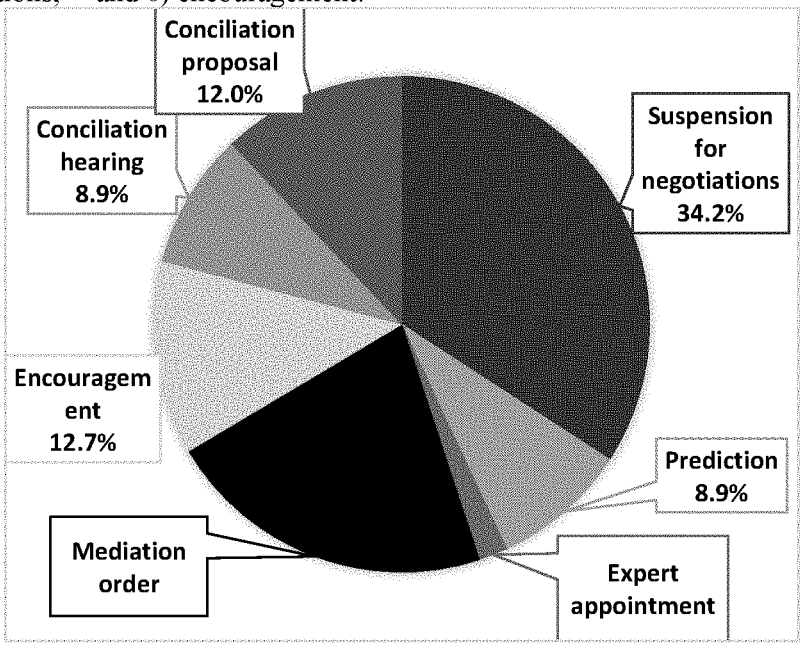

Figure 4. Types of JCR in court protocols. N=158

3. *ASSOCIATION BETWEEN JCR AND SETTLEMENT*

Cases that involved JCR were more likely to settle (see Table 1): 60.8% of cases that included JCR were settled compared to 3.3% of cases that settled and did not include JCR (χ^2=166.933 df=3 p<0.000).

	Judgment	Settlement	Probable settlement	Other	Total
No JCR	132	8	62	42	244
	54.1%	3.3%	25.4%	17.2%	100.0%
JCR	37	96	19	6	158
	23.4%	60.8%	12.0%	3.8%	100.0%
Total	169	104	81	48	402

[131] Based on documentation of such activity as indicated in court records.
[132] Based on documentation of such activity as indicated in court records.

Table 1. Association between JCR practices and Modes of Disposition. N=402

JCR practices were recorded in writing by the judge before/after the hearing (i.e., judicial conciliation proposals) in 11.9% of the total cases and during the hearing, in the minutes, in 27.4% of the total cases.

In sum, we found that judges made use of all the JCR tools given through the reforms, yet to a different extent, and that their intervention was associated with a higher rate of settlement. In the next section, we will explore the considerations underlying the choice of JCR tools, as observed in the courtroom and through interviews of judges.

B. *Fitting the Forum to the Fuss While Seeking the Truth*

Courtroom observations and interviews of judges enabled us to probe the reasoning underlying the choice of JCR tools. We found that judges choose the proper forum while taking into account distinct considerations.

1. TRUTH AS A UNIQUE INSPIRATION FOR JUDICIAL SETTLEMENT

The *liability* of each side was a central factor in deciding the dispute resolution method best suited to the case. Judges would not rely on instinct or make an off-the-cuff conciliation proposal, as has been found in other legal systems.[133] Instead, they preferred to refer to an expert report provided by the parties or to a court-appointed expert report. If the liability of the parties seemed clear from the expert report or could be presumed by law (such as in the case of watchmen when goods under the supervision have been damaged) — they were comfortable to write a judicial conciliation proposal.[134]

Thus, expert reports were widely referred to in court observations and interviews as a central piece of evidence upon which a judicial conciliation proposal could be made or a basis for negotiation to reach a settlement. In an interview, one judge explained: "I made my conciliation proposal according to the police report. Indeed, following the police report, I could presume that Tizio[135] was three quarters liable, and then the compensation had to be estimated according to that liability-percentage."[136] Another judge explained: "Banking law disputes are strictly technical, and I usually have a complete overview of the case only after the expert's report. At that moment, I am able

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[133] *See* Sela et al., *supra* note 5*; see also* James A. Jr. Wall & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 35–36 (1982).

[134] Art 185-*bis C*.p.c. (It.).

[135] A generic name used for an unspecified person.

[136] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (June 14, 2018).

to write a conciliation proposal."[137]

The *lack* of an expert report was also used at times to induce the parties to negotiate and settle. Though Figure 4 above, which portrays findings from the analysis of protocols, shows relatively meager use of the *court-appointed expert* (perhaps due to the fact that use of this tool, in comparison to others, is usually made later in the process), in court observations we found that the court-appointed expert may be mentioned in order to *induce the parties to settle*. The reasoning: Such an appointment incurs expenses upon the parties; thus, the parties might prefer to settle. For instance, in one case, the judge said to attorneys: "If you had deposited a private report on the costs of a possible demolition of the irregular garret, I could have done a conciliation proposal. Now I have to nominate a technical expert, and that means time and costs." In response, the attorneys asked the judge to fix another hearing in order to verify whether the parties were willing to negotiate their dispute.

Other forms of arriving at liability—presumed liability by law and liability after presentation of evidence—were mentioned as a basis for a conciliation proposal or settlement. An interviewed judge said: "In legal suits under art. 2051 c.c.[10][138] you can presume the liability, so I just had to make the hypothesis about the damages on the basis of the tables. I used to say to the parties 'the liability is *x*, the compensation should be *y*…'."

One judge, indeed, lamented that the difference between a conciliation proposal and adjudication seemed non-existent, and thus, the use of proposals, to him, was baffling:[139]

I haven't yet seen suits where I can presume the liability from the beginning of the trial. Maybe they exist, but it is much more difficult. In a false accounting case, I don't know if the financial report is false or not until I read the expert report, and once I have the expert report, I am ready to write the final judgment. So, how would I make a conciliation proposal if I am able to write the final judgment?

The search for liability was central from the lawyers' points of view as well. For example, in the first hearing of a case involving the collapse of a building's parking area, owners of the apartments in the building sued the architect, builders, and surveyors for the damages. After the judge asked if they could reach an agreement, the architect's attorney said: "Your honor, I find it hard to reach an agreement here…. It would be at least necessary to understand who is responsible for the event." The builders' attorney said: "I

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[137] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (Oct. 16, 2018).

[138] Art. 2041 C.c. (It.) (denoting liability of a watchperson).

[139] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (June 14, 2018).

believe that an expert-report is necessary in this case, in order to understand the exact amount of the damages and, lastly, the exact percentage of liability of the defendants." The judge did not insist on his invitation and fixed another hearing to continue the trial.

In line with the need for an authoritative source to decide liability, prediction was barely used when liability was not clear-cut. This contrasts deeply with the common use of prediction in adversarial systems, as early as the first hearing of the pretrial.[140] This finding corroborates the quantitative analysis described in the previous section, which found prediction used in only 8.9% of trials (see Figure 3). As noted previously, the suggestion of a judicial conciliation proposal without specific authority in the past was grounds for recusal due to concerns regarding anticipation. Thus, 185 *bis* states explicitly that a judge who offers a judicial conciliation proposal may continue to preside over the trial.[141] However, prediction is still a marginal practice and did not take place at all in the trials that we observed. Interviewed judges usually articulated an aversion to prediction. For instance, one judge said:

Judges should not reveal their final decision, because they could be recused for that. In addition, it is clear that if the judge lets the parties understand his/her decision, that would be unfair, as the parties' agreement would be based not on the mutual evaluation of their interests, but rather on thinking: "I would lose anyway, hence, better to settle.[142]

In conclusion, judges interpret their authority to issue conciliation proposals narrowly, as an application of the law. Thus, the proposals, as hinted by one judge, can sometimes just slightly differ from adjudication.

Yet there is another side of the legal landscape which is extremely different. This will be explained in the next section.

2. *SHARP SEPARATION BETWEEN ADJUDICATION AND MEDIATION*

Mediation is viewed by judges as a transformative process, one which they have no time to attempt and whose place is not in the courtroom. Judges decide which cases are suitable for mediation while considering the parameters set out in the art.5(2) in Legislative Decree No. 28, 2010 (nature of the dispute, conduct of the parties) and other issues (e.g., parallel proceedings, an ongoing relationship).[143] One judge explained: "In mediation the parties have their chance to address the case from a broader point of view.... Sometimes there is another pending case before a different judge of a different

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[140] *See* Sela et al., *supra* note 5, at 106–108.

[141] Art. 185-*bis* C.p.c (It.).

[142] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (June 28, 2018).

[143] D.Lgs. 4 Marzo 2010, n.28 (It.). Judges make these determinations with the help of legal interns who analyze the case.

tribunal. Then I tell them that, within mediation, they can deal with the dispute as a whole."

Restarting communication in a relationship—business or other—was a central consideration in issuing a mediation order.[144] In one case, the lawyers offered to easily end the dispute through negotiation in light of interchanges during the hearing, yet the judge insisted on mediation:

Defense Attorney: "Your honor, if you could defer the hearing so that we have time to continue the negotiation…."

Judge: "Mmh, I was not thinking about negotiation, I consider this case suitable for mediation." The attorneys gave their consent.

The judge read the mediation order out loud: "Given that an expert report would be necessary in order to verify the amount of consumption, given that, at this stage of the trial, it would be favorable to reactivate the communication between the parties, also in order to avoid the costs of the future expert report, given that the mediation could furthermore preserve the business relationship between the parties…."

In another instance, the judge implored the attorneys to attempt mediation

to help the parties communicate and rehabilitate their relationship, yet the attorneys persuaded the judge that the relationship was so tense that a meeting between the parties would only aggravate the circumstances.

Since judges maintain a positive view of adjudication (seeing it as one of two separate dimensions of dispute resolution available to the parties), they do not usually apply a heavy-handed approach to settlement. Rather, they take the lawyers' opinions into serious consideration when deciding the suitability of the case for mediation or settlement.

In our observations, mediation was not coerced even though judges have the authority to do so through a mediation order. The judges, even if convinced the dispute could be solved through mediation, would not go against the lawyers' opinions. In an interview, a judge explained:

I am happier to issue the mediation order if they agree…. The most important thing is the lawyers' approval. They have to share, to approve the mediation order, otherwise... I prefer to go on with the trial and maybe to make

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[144] This correlates with the view that a central role of mediation is to improve communication between parties to a conflict, as clearly underlined by CLAUDIA COVATA, LA MEDIAZIONE PER LA COMPOSIZIONE DELLE CONTROVERSIE CIVILI E COMMERCIALI 497, 505 (Mauro Bove ed., CEDAM 2011) (stating that "the role of the mediator is, mostly, that of helping the parties understand both the nature and the potential of mediation, and to manage the emotions of the parties till they are able to restart dialogue and to point out all the possible shared and mutually beneficial agreements.").

them reflect on the mediation proceeding at a later stage, for instance after the requests of evidence. Sometimes they tell me 'I have to talk with my client beforehand' or 'I prefer to see the evidence of the other side,' and I postpone the mediation order.[145]

The use of articles 185 C.p.c, calling the parties to a conciliation hearing (usually only lawyers are present at hearings), was also often made in consultation with the lawyers, with the judge asking whether they thought bringing the parties together might advance a settlement.[146] The judge accepted their opinion, whether positive or negative.

In our interviews with judges, the sharp separation between the form of justice meted out in the courtroom and that which could be found in mediation centers was pervasive. In fact, the few complaints we heard about the reforms revolved around the link that had been created between ADR and adjudication. One judge thought that ADR and litigation should not be linked (i.e., through a mandatory preliminary session or a mediation order) so that parties could be free to choose whether to argue the case or to conciliate it.

The problem is the interconnection between the two proceedings. It would be more reasonable to provide two alternative ways. For instance, you can fight—if you go to the court, you go there to argue, and there will be the judge who will state if you're right or wrong and to what extent you're wrong. Otherwise, if you don't want to fight and want to find an agreement, you can follow other ways that maybe could be encouraged by benefits, but those are alternative ways. If we keep them interconnected, I have the feeling that someone will say: 'I do not know if they are trying to rub me.'[147]

He stated that combining the two methods, in the courtroom as well, seemed to compromise justice, as he felt he might be expected, in a conciliation proposal to divide a sum between the parties when only one side might be liable (a practice that according to this study does not seem common in the courts, probably because other judges seem to share this view, at least at this point in time):

Convincing the side who would be entitled to have one hundred to settle for seventy, or for example, fifty, or any percentage of one hundred, in my opinion, is in contrast with the function of the judge, who has to say who is entitled to have one hundred and who has no right to get anything, or twenty to fifteen, or ten. If I believe that the claimant is right, but I try to get him to an agreement, I would clearly try to convince him to give up with something that he is entitled to obtain and this, in my opinion, is not part of the role of

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[145] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (January 28, 2019).

[146] Art. 185 C.p.c. (It.).

[147] Interview with judge (anonymized due to the ethical guidelines of the study), Florence Court, Italy (June 14, 2018).

the judge.[148]

Following these and similar findings, we find it reasonable to argue that the judges separate more sharply than do common law judges between the truth-seeking in law and the truth collaboratively constructed by the parties in mediation. They insist on the legal criteria as the sole measure for judges even when pursuing JCR methods and avoid the common tendency in adversarial systems to perceive the legal truth itself as based on compromise and many times indeterminate. This dichotomy offers an interesting perspective on the issue of cooptation of mediation through court-annexed programs (in other countries). The concern is that court-annexed mediation is efficiency-focused and evaluative, thus compromising the potential benefits of mediation.[149]

3. MATCHING JCR TO DISPUTE TYPES: CONSIDERATIONS OF EFFICIENCY VS. A BROAD VIEW OF JUSTICE

It seems that judges in the Florence Court are developing a sensitivity to matching case type to dispute resolution method. In interviews and during court observations, judges noted that certain forms of disputes correlated with specific modes of disposition (the list below is not exhaustive). Here, too, the perceived distinction between types of cases suited for in-court justice (according to law) and the types that are suited for out-of-court justice (mediation) is apparent:

a. In-court justice

Judgment was appropriate (a) when the *compensation asked is too high for an agreement*, such as in death or serious injury damages claim; (b) in banking disputes that involve the *damaged reputation* of the plaintiff [for being registered as a 'risk']; (c) when the positions of the parties are too far apart; (d) when the matter involved inalienable rights (in which case other forms of disposition are not allowed by law).

Judicial conciliation proposals were mentioned by judges as appropriate for: (a) corporate liability cases, since, according to one judge "parties are very interested in a *rapid reconciliation and quick definition* of the suit, because commercial companies are dynamic entities and need certainty;" (b) public administration disputes—the judge explained: "Public administration bodies don't tend to go to mediation, since due to oversight, they must have an *authoritative stamp of approval* for their decisions;" (c)

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[148] *Id.*

[149] *See* Patrick G. Coy & Timothy Hedeen, *A Stage Model of Social Movement Co-optation: Community Mediation in the United States*, 46 SOC. Q. 405, 405 (2005) (noting that "community mediation has become increasingly institutionalized and has undergone various degrees of co-optation in its evolving relationship with the court system.").

insurance claims, only if the suing party was willing to accept low compensation to receive the sum quickly; (d) banking disputes, following an expert report, whereupon the judge can easily offer a proposal, as the disputes are *technical;* (e) disputes in which liability is presumed by law.

b. Out-of-court justice

Mediation orders were mentioned as appropriate "when the case involves aspects that are outside the dispute, and it would be appropriate to mediate all issues." This includes: (a) interpersonal disputes (e.g., between neighbors); (b) contractual relations between people, as in these cases, as said one judge, "usually extra-legal issues are present;" (c) cases in which another proceeding is ongoing between the parties.

In general, as can be observed above, judges are becoming adept at discerning the needs present in certain case types: whether it be an overriding need for efficiency, the need for a public stamp of approval, or the need for a broad notion of justice that addresses extraneous concerns.[150]

V. SUMMARY OF FINDINGS AND IMPLICATIONS

Despite wide-ranging skepticism on the ability to change an adjudication-based legal culture, the Florence first-instance court has been able to implement judicial reform encouraging settlement and mediation. This continental civil law setting has given rise to a unique form of judicial conflict resolution (JCR), one that continues to search for the truth while making room for a broad perspective of justice in cases that would benefit from it.

In the relatively short time following judicial reform (with the large bulk of reforms introduced between 2010-2013 and this study conducted on case dockets from 2013-2016), JCR practices took place in 39% of cases and took on six different forms (including practices introduced by the reforms). Moreover, JCR practices correlated with increased settlement: 60.8% of cases that included JCR were settled compared to 3.3% of cases that settled and did not include JCR.

Even more surprisingly, settlement or probable settlement occurred in 46% of the cases, with judgment on the merits taking place in 42% of cases. Though adjudication occurred in less than half of the cases, it is still very much

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[150] A study in the Florence first-instance court substantiates the use of the tools by judges for the year 2018. *See* Elisa Guazzesi, *I dati di Giustizia semplice*, *in* MEDIAZIONE DEI CONFLITTI. UNA SCELTA CONDIVISA 173 (Paola Lucarelli, ed., 2019).For an analysis of the social impact of the research, see Annalisa Tonarelli, *L'impatto sociale del progetto. Una ricerca sulle trasformazioni all'interno del "campo giuridico, in* MEDIAZIONE DEI CONFLITTI. UNA SCELTA CONDIVISA 223 (Paola Lucarelli, ed., 2019).

on the table as a favorable option for the parties: Judges do not generally use a heavy-handed approach to pressure the parties to settle. Yet even without pressuring the parties, a substantial rate of settlement was reached.

The Florence Court is not alone in seeing the reforms implemented. The use of judicial conciliation proposals and mediation orders has risen in Italy in general. In addition, the initiators of the *Simple Justice* program that has instilled ADR awareness in the Florence Court have also recently been tasked with applying the Florence model to courts around the country—to the first-instance court of Perugia, Region of Umbria, and, after recent implementation of the project in the Court of Appeals in Florence, to Tuscan first-instance courts. Italy's Justice Minister has recently decreed the appointment of an expert commission with the task, among the others, of spreading the new ADR models around the country.[151] Gradually, mediation and judicial conciliation are making pace.

What does this mean for Italy? Since Italy is still in a period of transition, it is still too early to say anything definitive. If the trend is taken further, it could mean that trials, instead of vanishing in wholesale fashion, may be held when appropriate. It could mean the creation and demarcation of two distinct paths to justice, one based on legal statutes and principles of efficiency and the other based on a broad perspective of conflict and transformative justice. The result could be a better service to the community as a whole.

As explained in the previous chapter, judges generally espouse a dichotomous perspective regarding the options provided by the new legal landscape. On the one hand, they view courtroom justice, applied through judgments and judicial conciliation proposals, as being made only after finding the truth (i.e., the actual liability of the parties). On the other, they view mediation, which is not connected to the court system, as a transformative alternative that offers a broad notion of justice for parties with extraneous issues (e.g., a relationship, parallel proceedings).

This dichotomous view contrasts with possible trajectories generally raised for the judicial role in adversarial culture: the problem-solving judge who takes a broad perspective of conflict, or the efficiency-oriented judge who manages the case during pretrial while pressuring the parties to settle (with or without regard to actual liability). Currently, in adversarial culture, the judicial role mainly follows the latter trajectory. The approach taken by judges of the Florence first-instance court offers another possibility, which, if further explored, may offer a new model of justice.

Since judges observed and interviewed in the Florence Court maintain

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[151] *See Decreto del Ministero della Giustizia per l'istituzione di un tavolo tecnico sulle procedure stragiudiziali in ambito civile e commerciale*, 23 dicembre 2019 (It.).

a positive view of adjudication (as one of two separate dimensions of dispute resolution available to the parties), they do not usually insist that parties attempt mediation or settlement. Judges send parties to mediation using a mediation order, but do not usually coerce the parties to do so despite their authority by law. Judges may ask the lawyers whether settlement is possible, yet will not themselves help the parties settle other than to determine liability and, at times, to mention costs. Surprisingly, lawyers' settlement efforts might even be stopped by a judge who considers the case more suitable for mediation due to a relationship between the parties.[152]

The dichotomy of concepts of justice—the court as a place for adjudication or near-adjudication on the one hand and independent mediation agencies as a place for possible transformation on the other—is also encouraged by the structure of the legal system. Court-annexed mediation does not exist in Italy; mediation takes place in government-approved independent mediation agencies. In addition, for the most part, only lawyers are present at court hearings, unless the judge specifically calls the parties to be present for a conciliation attempt.[153] In contrast, parties must appear for mediation (accompanied by their lawyers). Mediation, as mentioned in Section III, usually takes on a facilitative-transformative flavor, very distinct from the formal application of the law in courts.

A factor supporting this dichotomy is the ability of judges to separate between efficiency concerns and the need for a broad perspective of justice. This was largely made possible by facilitating judges' decisions on issuing mediation orders through analysis of cases by legal interns according to certain variables, thus raising awareness to the possible benefits of mediation.

In addition, with time, the suitability of certain types of cases to certain types of JCR has become clearer. Judges mention which types of cases lend themselves to judicial conciliation, a mediation order, or a court-appointed expert.

Thus, the variety of JCR tools that have been provided to judges have given rise to the *screening judge*, who fits the forum to the fuss while seeking the truth, taking into consideration the possibility of a broad perspective of justice, and developing a sensitivity to the modes of dispute resolution that match certain case types. This judge has a favorable view of both adjudication and mediation, reinforcing the dichotomous system: One that offers application of the law on the one hand and a broad perspective of justice on the other.

The comparative analysis suggests that judges influenced by an

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[152] This judicial perspective may further be encouraged by the fact that in most courts in Italy judges' efficiency is not measured through the number of cases that they close but by the number of verdicts they write.

[153] Art. 185 C.p.c. (It.).

inquisitorial tradition may be more prone to capturing the positive aspects of a broad conflict resolution perspective (when exposed to ADR education) than their adversarial peers: Rather than pressuring the parties to settle, they examine whether the case is appropriate for mediation, adjudication, or settlement. While judges in the Florence Court allocate cases to the appropriate track and use their quasi-inquisitorial powers to decide cases by law through trial, their peers the adversarial judges manage legal cases to promote settlement, often using inquisitorial-like intervention to avoid the trial and the need to give a legal decision altogether.

The wide range of dispute resolution modes introduced into Italian legislation brings to mind the vision of a "multi-door" courthouse that channels litigants to the best type of resolution method for their case.[154] Judges who were exposed to the value of mediation by an academic effort emphasizing the inner value of this process, and who were trained to sort out legal disputes in a search for resolution, became umpires of mediation and perceived their role as broader than disposing the case. They might refer parties to mediation even when the lawyers propose negotiation; they speak in favor of more comprehensive solutions to complex cases. They may, in time, become experts at screening cases and advising parties how to proceed, similar to the screening clerk in a multi-door courthouse as imagined by progenitors of ADR.[155]

Closely watching the developing experience of judges in Italy may help create tailored solutions according to dispute type, interests of litigants, extra-legal aspects of the dispute, and other relevant considerations.

Above all, our study shows that judges can be pioneers in the transformation of resolution of conflicts without eroding the traditional judicial role or coopting mediation. They can preserve the dichotomy between adjudication and mediation and make sure that each case is handled through an optimal process that fits the nature of the case.

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[154] Sander, *supra* note 33.
[155] *Id.*