di Marco Marianello*

Contractual Autonomy and Out-of-Court Settlement Procedures in Italian Private Law

Because the law don't change another's mind
(B. Hornsby - The Way It Is)

1. From ADR (Alternative Dispute Resolution) to CDC (Complementary Dispute Resolution)

Common law uses the acronym ADR (Alternative Dispute Resolution) to refer to certain out-of-court remedies.

These remedies, on the one hand, originate in the endemic crisis reached by the judicial system administered by the state[1] and, on the other hand, have been affected by the significant increase in the internationalisation and deregulation of contractual relationships.

The high level of conflicts that characterises modern economies[2], which is due to both the break-down of legal systems and the fast growth of economic trade, is causing a progressive stalemate of traditional "judicial remedies", which are proving increasingly inadequate in providing a responsive and efficient service.

It should be noted that, despite the clear wording of Article 24 of the Italian Constitution[3], the misleading terminology introduced by leading scholars, which is a literal translation of the acronym ADR, is based on the purpose of the remedy, underlying the amicable settlement of disputes.

It must be acknowledged that the European legislature also aims at facilitating access to dispute resolution (Directive No. 2008/52/EC on certain aspects of mediation in civil and commercial matters), on the one hand, through the promotion of cross-border out-of-court settlement procedures and, on the other hand, by coordinating the use of such procedures with that of judicial remedies[4].

Significant areas of micro-conflict have also arisen as a result of the increase in so called consumer contracts and of the laws

[1] Newmark C., *International ADR: a flourishing field*, in *Cross-border Quarterly*, 2007, 29, «Alternative Dispute Resolution is an umbrella term for any process other than litigation, arbitration or direct negotiation between the parties, which is used to resolve a dispute. There are a number of different ADR process. However, of these, mediation is the most common and the term ADR is often used to refer to mediation».

[2] Resta E., *Il diritto fraterno*, Roma-Bari, 2005, 5, «The fraternity (...) is nothing else than the right and assumes the guise of another right, but it is perhaps the secret heart, the more central the more the solution of the problems seems to be related to planetary dimensions».

[3] Pagni I., *Mediazione e processo nelle controversie civili e commerciali: risoluzione negoziale delle liti e tutela giudiziale dei diritti*, in *Soc.*, 2010, 620, «Without neglecting the need for the protection of rights, when there is no space for a negotiated solution, is to be guaranteed in the forms art. 24 of the Constitution, the decree has enhanced the peculiar form of dispute resolution which consists instead in reaching an agreement. One enhancement that is made (...), as suggested by the EU directive, and encourages the parties, and their advisers, to consider the possibility that, instead of introducing the judgment immediately, before you try to reach an amicable agreement, with the aid of a mediator, independent and impartial, because these can bridge the gap between the positions of the litigants, by identifying, through separate interviews with each of them, the possible points of intersection of the will».

[4] Caponi R., *La giustizia civile alla prova della mediazione (a proposito del d. leg. 4 marzo 2010 n. 28)*, in *Foro it.*, 2010, V, 89, «The mediation/conciliation meets considerable support in the institutions of the European Union. The D.Leg. 28/10 lends itself to implement the EU Directive of 21 May 2008 on the mediation of border disputes. All aspects covered by the Directive are transposed: the reconciliation delegate (Article 5, paragraph 2), the enforceability of settlement agreement (Article 12), confidentiality (Articles 9 and 10), plus the effect on the terms of prescription and limitation». Comoglio L.P., *Mediazione e accesso alla giustizia*, in *La mediazione. Profili sistematici e potenzialità applicative* (a cura di Bulgheroni C.-Della Vedova P.), Roma, 2012, 13 ss., «"The 'core' (or, if you prefer, the Wesensgehalt) of this basic conceptual expression - while variously rendered by the languages of the Union (access to justice, accès à la justice, Zugang zum Recht, access to the justicia, access à justiça, and so on) - is represented by the right-judicial power of action, according to which (in the Italian system of guarantees related to "due process": Articles. 2, 24, 1st-3rd paragraph 25, 1st paragraph, 101, 102-108, 111, 1st-2nd paragraph 113 of the Constitution) "everyone can take legal action to protect their legitimate rights and interests." But the same principle, of course, is obtained by art. 6, § 1 of the European Convention of 1950, as well as other international instruments conventional». Albanese A., *Dalla giurisdizione alla conciliazione. Riflessioni sulla mediazione nelle controversie civili e commerciali*, in *Europa dir. priv.*, 2012, 243 ss., «The mediation process is further differentiated from judicial review, since, if it passes, culminating in an act of will of the parties, not heteronomous with the decision of a public body».

*Lawyer and Mediator, PhD in Law of contracts and business economics, Research Fellow in Private Law

enacted to protect the so called "weaker" party to the agreement. Such micro-conflicts cannot be handled by traditional forms of dispute resolution since the high cost and the considerable length of court-led proceedings are unlikely to provide an adequate response to the multiple claims filed by individual customers.

The conquest of important areas of autonomy by private individuals is, therefore, not only relevant in connection with their ability to freely agree the terms of a transaction[5], but also to overcome and settle any dispute that may arise between the parties to such transactions[6].

This is consistent with the general principles of the Italian legal system, according to which individuals must be granted access to a system of remedies that enables them to enforce the rights they have been granted in case the counterparty does not cooperate to duly perform and comply with the obligations arising from contractual relationships[7].

The parties, save in relation to the so-called inalienable rights[8], remain free to retain full control over the actions carried out as a result of and in compliance with their contractual autonomy. Therefore, they may decide to settle their disputes by relying on out-of-court settlement procedures that, although not falling within judicial remedies, are considered equivalent to the latter by the Italian Constitution[9].

[5] Spadafora A., La regola contrattuale tra autonomia privata e canone di buona fede, Torino, 2007, 10, «Value takes on a decisive emerging data from the system of the Principles of European Contract Law. It is related to the easy observation that the structure of interest is devised by the contractors, here, far from being an entity intangible ab externo: instead of crystallizing as determined at the time of the genesis of the Act, the program is in fact conventional riplasmabile, scaleable, under the system integration and adjustment operations iudicis (governed - as you will have the opportunity to present - from the fee pursuant to bona fide), so that would seem to loom even a weakening of the individual will in the determination of the effects of negotiation». Bucelli A., Autonomia privata e mediazione conciliativa, in Quaderni di giurisprudenza , 2011, II, 21 ss.

[6] Ferri G.B., *Decisione negoziale e giudizio privato*, in *Riv. dir. comm.*, 1997, I, 18, «Recognition or authorization are nothing but baseless fictions. In fact, the network of general values, which prepares the state system, to enable its protection to acts of private autonomy and the values of all particularistic, that the latter expresses, by moving needs, goals and different logics, designed, for other never to meet. The protection that the system offers state order, rules, private, is reduced, in hindsight, in the event of breach of contractual private hires, an "action en justice" in relation to those acts of negotiating autonomy of whose values possible, ex post, see the compatibility with the values expressed by the Ordinamento state».

[7] di Majo A., *La tutela civile dei diritti*, Milano, 2001, 7, «It should be also resized the historical opposition between law and sub species tutelae process, because if the process is not the forum in which you define and qualify the needs of protection, but the substantive law, and with reference to the remedies provided herein known, it is however the process the place where such choices are intended to result in appropriate forms and techniques».

[8] Cuomo-Ulloa F., *La conciliazione, Modelli di composizione dei conflitti*, Padova, 2008, 459 ss., «Except for some sporadic deviations, in particular the doctrine of our local is mostly inclined to the view that the essential condition for the reconciliation can legitimately operate in our system is the nature of the available rights at issue, the parties can not validly use the tool of conciliation to resolve disputes that relate to rights by law or by nature, subtracted from the power of disposal of the parties. The most immediate justification of the combination of conciliation / availability of rights do you descend from withholding negotiating nature of the institution, from which it derives - like what happens to all the shops of private law - a limit to the freedom and autonomy of individuals [...]. The sharpness of this solution is mitigated, however, when, from the definition of the principle is passed to accept the consequences of application: it is, in fact, consider the problem, among the most controversial doctrine in civil and processualcivilistica, the detection limits of power disposition of rights, namely the delimitation and the filling of the category of so-called inalienable rights. Beyond the easy identification of personal rights such as the right to life and physical integrity of the already less easy selection of the rights pertaining to a family relationship, the greater uncertainty encountered when they abandoned the category of rights is not capital, which goes into the ground of the rights of a sheet, in an attempt, not always fruitful to identify the distinction between positions subject to the free domain of individuals and positions by nature or by law excluded from private autonomy». Comoglio L.P., *op. cit.*, 16, «Mediation is configured to protect the rights or interests of "available" as a process (so to speak) of "voluntary jurisdiction", entirely entrusted with the onset of the dispute, the initiative and management "dispositive" the same parties, although it is left to national legislation the discretionary authority to provide that the court seised in limine litis can not only remind the parties the possibility of recourse to a "mediation", but also, when necessary, fix a maximum period for the depletion of the related procedure extra judicium». Santagada F., *La conciliazione delle controversie civili*, Bari, 2008, 197 ss., «the difficulty of explaining the rights of those CDs. unavailable, which should remain outside the settlement. If, in fact, it is common doctrine and jurisprudence in the character unavailable for the rights of personality, power, of personal status, as well as the right to food - the latter understood as a right of a financial nature descending ex lege by the state of genotore, son and spouse - all being designed to preserve an interest which transcends that of the person who holds it, there is, for example, as much convergence of views regarding the nature of the rights deriving from constitutional provisions or by mandatory».

[9] Bianca C.M., *Diritto Civile*, III, Milano, 1991, 32 ss., «The freedom of negotiation remains a constitutional value and its limitations must indeed be socially justified, otherwise resolving the infringement of a fundamental human right. The protection of freedom of contract notes in the relations of private law, making it unlawful interference of third parties aimed at changing the free self-determination of the subject and by placing a limit of validity to the stores through which the person to renounce their freedom of disposition».

It follows that ADR procedures should not be regarded as adverse to and/or inconsistent with the traditional judicial system, which has proven itself to be unable to provide effective solutions in keeping with a modern conflict management model[10].

Out-of-court settlement procedures carry out a distinctive role with respect to the judicial remedies available within the Italian legal system. This role is neither ancillary nor "alternative" but rather complementary to the protection offered by judicial remedies. Accordingly, the parties are free to enter into a dialogue on a constructive basis and maintain a form of control over the relevant proceedings and, in the event of a negative outcome, they are still entitled to bring an action before the competent court[11].

However, out-of-court settlement procedures are only in theory "alternatives to civil judicial remedies"[12]. In practice, they will only be able to achieve this purpose and be extensively used to reduce the civil courts' workload if and to the extent they ensure that impartiality, the fair treatment of the interests of all parties involved and the adversarial principle are respected[13].

The socio-anthropological meaning of conflicts (independently from any evaluation of the meaning ascribed to such term)[14] refers to disputes between opposing interests, which may achieve different levels of settlement depending on the complexity and on the degree of "flexible" control that the parties intend to pursue in this regard. These disputes may, indeed, be resolved through the use of informal settlement procedures, aimed at achieving shared solutions that the parties spontaneously agree to abide by, instead of being resolved by recourse to legal proceedings[15].

For the reasons set out above, it seems appropriate to replace the acronym ADR (and the relevant literal translation) with the newly-created acronym CDR (Complementary Dispute Resolution), since out-of-court settlement procedures should be considered complementary to judicial remedies in resolving conflicts[16].

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[10] Gulotta G.-Santi G., *Dal conflitto al consenso. Utilizzazione di strategie di mediazione in particolare nei conflitti familiari*, Milano, 1988, 7 ss.

[11] Cosi G.-Foddai M.A., *Lo spazio della mediazione*, Milano, 2003, 1 ss., «Even our culture for a long time belongs to the group of those who have decided to delegate the management of social conflicts to the law and its instruments of formal decision of disputes. It does not matter if the civil or common law, if "accusers" or "inquisitors", our legal systems seem the only ones capable of ensuring peace and order, while at the same time the need for interventions to control excessive repressive, or even totalitarian. However, it is precisely from within the most modern legal procedural argument between cultures, the American, who have developed the most significant alternative reactions to procedural rationality-formal. There are now more than thirty years that informal methods of dispute resolution - in particular those based on the model of conflict mediation - are widely used in the Anglo-Saxon legal systems, and especially in the U.S.A.». Pagni I., *op. cit.*, 620, «As both share the view that the spread of the instrument of conciliation has not simply function deflationary, but is complementary to the process, because, on the one hand, limiting the abuse of the right to judicial protection, promotes the expeditious administration of civil justice, from 'other, and conversely, assumes the proper functioning of the same, since the prospect of effective judicial protection tends to discourage obstructionist strategies in the implementation of the substantive relationship and to encourage out of court the dispute consensually defined».

[12] Carnelutti F., *Istituzioni del processo civile italiano*, Roma, 1956, 60.

[13] Taruffo M., *Adeguamenti delle tecniche di composizione dei conflitti di interesse*, *Riv. trim. dir. e proc. civ.*, 1999, 791.

[14] Troisi C., *Autonomia privata e gestione dei conflitti*, Napoli, 2007, 16 ss., «As part of the mediation, the conflict has a negative connotation, it is considered simply as a life event that can affect both growth and evolution both be destructive when it is not managed or poorly managed, so that the dynamics lead to a dissolution of the structure within which it occurred. The conflict is a "situation" and as such must be addressed, managed, perhaps through the instrument of mediation, this instrument is distinguished from other direct interventions to reduce or eliminate the conflict because it sees the conflict as a "problem" rather than a situation . In other words, most of the traditional techniques of conflict resolution are turning their attention to the ways in which the conflict occurs, its problematic consequences rather than the conflict itself».

[15] Fisher R.-Shapiro D., *Il negoziato emotivo*, Milano, 2012, 5, «Emotions play a crucial role in the process of negotiation because we negotiate every day, whether it's deciding where to go for dinner, how much to spend on a second-hand bicycle or when dismissing an employee. And we always try the emotions. These may be positive, such as joy or satisfaction, or negative, such as anger, frustration or guilt. When we negotiate with others, how should we manage emotions, our own and others? As we try to ignore them, will not disappear: they can cause distraction, pain, and the failure of the negotiations, and also divert our attention to an important issue that we should instead try to solve on the spot. Yet, when we negotiate a formal or informal, we have too many things to think about in order to analyze every single emotion and decide how to deal with it. It is difficult to manage feelings that are unleashed within us».

[16] Greco A., *La via italiana alla mediazione alla luce del d.lg. 4.3.2010, n. 28 e del d.m. 18.10.2010, n. 180*, in *Obbl. e contr.*, 2011, 362, secondo cui «From the point of view of terminology, however, the qualification of the Institute as a method of dispute resolution "alternative" to judicial proceedings is not entirely correct and may lead to some confusion». Also Section 9) of the Green Paper of the European Commission, relating to alternative modes of dispute resolution in civil and commercial matters, 19.4.2002, reads that «*The ADR plays a complementary role to the judicial, because the*

The various CDR models differentiate themselves, therefore, on the basis of their nature and legal structure, and the degree of autonomy of the parties. The latter reaches its peak in the negotiations, where the parties take full control over the management of the dispute, then weakens in mediation and almost disappears in arbitration proceedings.

Leaving aside the analysis of the nature and legal structure of CDR models, it is worth reiterating that, - with regard to the discretionary component - private autonomy finds its highest expression in the negotiation phase, where the parties retain full control over the procedure and regulate their own interests themselves[17].

This method of conflict management is effective if and to the extent the parties involved actively co-operate in solving problems, maintain a constructive dialogue and mutually exchange all information needed for the management of the issues that have arisen during the discovery phase[18].

Mediation, on the other hand, is a process by which the parties attempt to settle a dispute by availing themselves of a third party – i.e. the mediator – who is not involved in the issue at stake and is independent of the parties. The mediator's role is to assist the parties in establishing a flow of communication and considering new alternatives in order to pursue - at a later stage and if possible – a settlement[19] [20].

In the so called "facilitative" mediation, an impartial, neutral and independent third party helps in establishing and facilitates the dialogue between the parties, who remain free to reach an agreement (which often novates the original claim) or bring a claim before the competent court[21].

"Evaluative" mediation differs from the previous technique because of the role played by the mediator, who is empowered

methods adopted in the ADR are often more suited to the nature of disputes. The ADR can help the parties in a dialogue that would otherwise have been impossible, and to assess themselves the opportunity of going to court».

[17] Fisher R.-Ury W., *Getting to yes*, New York, 1991, 8 ss., «Bargaining over positions creates incentives that stall settlement. In positional bargaining you try to improve the chance that any settlement reached is favorable to you by starting with an extreme position, by stubbornly holding to it, by deceiving the other party as to your true views, and by making small concessions only as necessary to keep the negotiation going. The same is true for the other side. Each of those factors tends to interfere with reaching a settlement promptly. The more extreme the opening positions and the smaller the concessions, the more time and effort it will take to discover whether or not agreement is possible».

[18] Rumiati R., *Decisioni manageriali*, Bologna, 2010, 170, «In reality, organizational, conflict resolution is often conditioned by the fact that the contestants can not take positions ultimative or non-cooperative, often having to continue to live with and probably to cooperate in other circumstances». Luhmann N., *Sistemi sociali*, Bologna, 1990, 596, «We'll talk about conflicts whenever communication is contradicted, or you could even formulate, whenever a contradiction is communicated. Because there is no conflict, must therefore occur two statements that contradict each other. The conflict takes the load, for a certain period, autopoiesis, namely the continuation of the communication».

[19] Satta S., *Dalla conciliazione alla giurisdizione*, in *Riv. dir. proc. civ.*, 1939, I-II, 204 ss., «The significance of the intervention of the third party can intervene between the parties litigants cooperating in the determination of their will. The significance of this action is remarkable: it is not so much of an appeal to the authority of the person, as his experience as a man, a man who must make the right reasoning of others, and through its form the others (reasonable) will».

[20] Punzi C., voce *Conciliazione e tentativo di conciliazione*, in *Enc. Dir.*, 2000, IV, 329,«Reconciliation can be improved even with the waiver of such claim or with the full recognition of the claims of others». Punzi C., *Mediazione e conciliazione*, in *Riv. dir. proc.*, 2009, 853, «Mediation is not configured as an institution distinct from conciliation and characterized by the meeting of the parties to fulfill their treaty, albeit subsidized, but only facilitated by the assistance of a mediator, where, however, the conciliation involves the intervention of the third conciliator, which plays an active role in formulating a proposal, which the parties are free to accept, perfecting, with the acceptance of the proposal, the conciliation. To say, in fact, that mediation is aimed at reconciliation means attributed to the sole function of mediation intervention of a third party who, mediating between the parties and formulating a proposal, performs what is nothing more than a real attempt at conciliation».

[21] Iannicelli S., *La conciliazione stragiudiziale delle controversie: modelli differenti e dubbi interpretativi*, in *Obbl. e contr.*, 2008, 146, «To speak of reconciliation without further specification is to say everything and nothing at the same time, being able to take so many forms itself as necessarily requiring more precise qualifications. If it is true that conciliation could be defined, in a first approximation, a negotiation of the dispute settlement procedure in which the parties have recourse to the assistance of a neutral and impartial third party, it is true that a generic definition so not only testify to the versatility the same conciliation». Luiso F.P., *La conciliazione nel quadro della tutela dei diritti*, in *Studi di diritto processuale civile in onore di Giuseppe Tarzia*, Milano, 2005, vol. III, 2076 ss., «qualifies as conciliation "adjudication" or "evaluative" ("rights-based mediation") the model that "requires the mediator to assess the merits of the respective claims, in order to formulate a proposal for the contents of which, of course, is parameterized on the opinion the conciliator has been made about the positions of the parties. The author also notes that 'experience knows another kind of reconciliation, which we might call - in contrast to the conciliation/adjudication above - as conciliation/mediation (or conciliation "facilitative"), or even "interest based mediation". It is not relevant in the substance of the claims, but the satisfaction of interests: with this type of conciliation, we try to identify what are the real interests of the parties, beyond the claims formalized (and could not be otherwise) in legal terms».

by the parties to propose a solution to the dispute, provided that the parties reserve themselves the right to accept or reject such proposal[22].

In an arbitration procedure, the parties' autonomy is limited to the very initial stage of the proceedings, when they decide to appoint a third party to settle their dispute(s) by executing an arbitration agreement or by setting forth an arbitration clause in a contract[23].

The contractual autonomy of the parties is significantly lower in an arbitration procedure than in any of the other two mediation techniques, given the decisive nature of the arbitration procedure and the fact that it is exclusively administered by a third party. As a result, arbitration procedures are "ideologically" and ontologically closer to judicial remedies[24]. Nothing in the Italian legal system prevents the parties from creating new out-of-court settlement procedures, resulting from a combination/merger of the techniques described above (so called "hybrid" procedures) or from outlining a specific sequence of such procedures (so called "multi-phases" procedures) or from setting out that a number of parties may join the negotiations table (so called "multi-parties" procedures)[25].

2. Concluding remarks

In order to build complementary out-of-court settlement procedures a cultural change is required on the part of all economic players and professionals. The need to expand complementary out-of-court settlement procedures cannot rely on temporary factors such as the excessive costs and unreasonable length of civil proceedings[26]. The use of these procedures should also be considered favourably in societies with an efficient judicial system, since these complementary procedures are available to each individual in addition to the traditional judicial remedies[27]. Practice[28] has shown both a lack of knowledge and suspicion on the part of participants to out-of-court procedures. Both such elements significantly undermine disclosure of the real interests at stake[29].

A greater involvement of legal professionals (such as advocates), which has been favoured by recent laws, may also contribute to boosting the use of out-of-court settlement procedures.

Lawyers[30] must acknowledge that busi-

[22] Caggiano A.I., *L'arbitrato e la conciliazione stragiudiziale nel settore immobiliare: disciplina e prassi in Italia*, in *Obbl. e contr.*, 2010, 376, «It comes to negotiating a settlement proceedings of a dispute in which the parties have recourse to the assistance of a neutral and impartial third party to agree on a settlement of the dispute and recorded at the end of this attempt, their non consensual agreement or the composition of the lite itself. "R. Caponi, the court conciliation as a method of ADR ("Alternative dispute resolution"), in Foro it., 2003 V, 165, 'Although the different concrete content of the conciliator will not reflect on the legal agreement conciliatory, this diversity is not without implications prescriptive, but rather gives rise to a distinction between two models: the first, in which the conciliator, without giving up normally to the task of clarification and guidance, we only tend to bring the positions of the parties, or, especially when attempting threat of failure, may come to formulate a proposal for an informal agreement which no trace remains (called conciliation "facilitative"), a second in which the conciliator shall make a proposal of agreement between the parts, which, although not binding, as a rule affect the decision on costs in the eventual judicial process (reconciliation "evaluative")».

[23] Luiso F.P.-Sassani B., *La riforma del processo civile*, Milano, 2006, 263.

[24] Troisi C., *op. cit.*, 97 ss., «The arbitration is part of the ADR techniques, it is the tool "ideologically" closer to traditional systems by virtue of his spirit litigation, aimed at identifying the responsibilities arising from a dispute through a decision from above and set the conflicting through the logic of reconstruction of the facts and research of the applicable rules».

[25] De Palo G.-D'urso L.-Golann D., *Manuale del mediatore professionista: strategie e tecniche per la mediazione delle controversie civili e commerciali*, Milano, 2010, 43 ss.

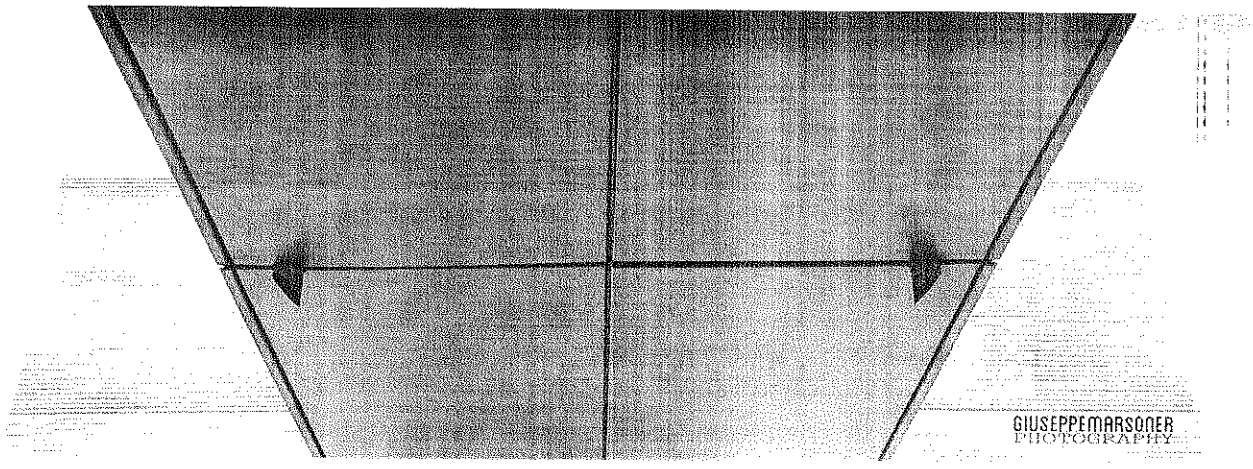
[26] Buffone G., *Mediazione e conciliazione: tutte le novità in vigore dal 20 marzo 2010*, Milano, 2010, 31, «There is no doubt that the establishment of a mandatory mediation has cost (and indifferent) and weigh (and not a little) access to jurisdiction. In the first place there is a delay in the direct to the Judge, provided that the mediation process has a physiological time of four months. (...) The mediation has a cost that must withstand expected that these parties have an obligation to remunerate the mediators intervene in the proceedings aimed at reconciliation, through the payment of the allowance provided by law (even if conciliation fails)».

[27] Chiarloni S., *Stato attuale e prospettive della conciliazione stragiudiziale*, in *Riv. trim. dir. e proc. civ.*, 2000, 455.

[28] Marinaro M., *La designazione del mediatore tra legislazione e prassi ministeriale*, in *Riv. Arbitrato*, 2012, 1023, «The main risk is that the function of the mediator is increasingly considered contiguous to that of an "evaluator" (contracting) rather than to that of a "facilitator». It refers, in that regard, the research project entitled "Mediation for the enterprise system", carried out by the Chamber of Arbitration of Rome in collaboration with the CENSIS available in the full version at the following address: http://www.cameraarbitralediroma.it/pagina79_studi-and-ricerche.html

[29] Malangone N., *Il setting della mediazione: contesto fisico, semantico e psicologico*, in *Quaderni della mediazione*, 2011, 65, «The implementation of justice landscape, where the parties sit around a table in common, as points of a circle from the center-mediator».

[30] Militerni L., *L'avvocato nel procedimento di mediazione*, in *Quaderni della mediazione*, 2011, 15, «If the lawyer you'll want to cut out a crucial role in



ness players are increasingly "running away from judicial remedies"[31] and that they will be asked more and more often to advise the parties and represent them in relevant out-of-court procedures[32].

It should be noted, however, that any possible solution that may be explored in theory cannot ignore the fact that implementing out-of-court settlement procedures implies an unavoidable "cultural" change on the part of all the relevant stakeholders, who would need to accept a "flexible" system of protection of rights. The current economic and financial crisis (like all those that preceded it) was not caused by a lack of regulation, but rather arose out of conduct which was mainly ethically reprehensible[33].

In light of the above, modern economies (and settlement of the conflicts arising between the relevant parties) require, in order to operate efficiently, some "intangible" assets (such as trust, honour and reputation) that cannot be found in the legal framework, but must necessarily reside in the inner sphere of each individual, in order to differentiate the abstract and formal positions from the underlying real interests[34].

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the mediation process will be required, by individual interpreters of the legal profession, taking a leap of quality. Besides the traditional role that the lawyer takes on during the trial, he must be able to assume a new one, based on dialogue and understanding».

[31] COSTANTINO G., *Economia e processo: contributo alla definizione delle regole processuali nei conflitti economici*, in *Riv. trim. dir. economia*, 2009, 23, «At the bottom of attempts to escape from jurisdiction and ordinary jurisdiction, of which there has been some instance, even on the basis of suggestions coming from overseas, where the remedies are explained without pretense, especially in the current economic crisis, it seems to lead the way the belief that, as the cost of legal services is high and poorly productive, if you can do without».

[32] CAMUSI M.P., *L'introduzione del livello di mediazione preventivo inciderà in maniera positiva sulla professione legale*, in *Guida dir.*, 2010, 14, 11 ss., «Introduce a level of mediation prior to adjudication is an element that will certainly affect the profession, emphasizing an attribute of role, that of mediation, in fact, that lawyers play forever, and inducing greater specialization for this function that can be acquired».

[33] CARBONNIER J., *Flessibile diritto. Per una sociologia del diritto senza rigore*, a cura di A. De Vita, Milano, 1997, 5, «We need to reduce the legal pressure, at the same time change the type of standards. The issue of non-law is a matter of balance. But hopefully not in any way a world without rules. Only, we call upon other rules, more natural, natural necessity, observe that individuals spontaneously».

[34] KANT, *Critica della ragion pratica*, Bari, 1996, 201 ss.: «Two things fill the mind with admiration and veneration ever new and increasing, the more often and longer reflection takes care of them: the starry heavens above me and the moral law within me. These two things I do not need to look for them and simply suppose them as though they were veiled in darkness or were in the transcendent, beyond my horizon, I see them before me and connect them immediately with the consciousness of my existence. The first begins with the place that I occupy in the external world of sense, and extends the connection in which I find myself, in a unending greatness, with worlds and worlds and systems of systems, and then again to unlimited times of their periodic motion, their principle and their duration. The second begins from my invisible self, my personality, and it is in a world which has true infinity, but which only the intellect can penetrate, and with whom (and thus also at the same time with all those visible worlds) I I recognize myself in a connection, as there simply accidental, but universal and necessary. The first show of the innumerable worlds undo all my importance of animal nature which must return again to the planet (a simple point in the universe) the material of which it was formed, after being fitted for a short time (and you do not know as) the life force. The second, however, infinitely elevates my worth as a value of an intelligence by my personality, in which the moral law shows me a life independent of animality and even from the whole sensible world, at least as can be inferred from the determination conforms to the purpose of my existence by this law which are not confined to the conditions and limits of this life, but extends to infinity».