

A SIGNIFICANT COMMITMENT: THE INTRODUCTION OF A UNIFIED EUROPEAN CODE ON ADRS TO REGULATE CONSUMER DISPUTES. SEVERAL CHALLENGES IN THE ENFORCEMENT AREA

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ABSTRACT: The necessity of providing alternative forms of justice alongside ordinary courts has long been recognized as a key aspect of consumer protection policies within the European context, particularly in addressing the needs of the s.c. 'weaker party' in contractual relationships. Over time, the evolution of European legislation, coupled with the proliferation of alternative dispute resolution (ADR) systems, has prompted the involvement of supranational legislative bodies to standardize and harmonize national ADR regulations.

This paper begins by analyzing the gap between the theoretical framework and its practical application, emphasizing the need for a comparative analysis of the level of protection offered by national regulations and the minimum protection standards guaranteed by other EU Member States. From this comparative analysis, a supranational code for consumer ADR may emerge.

In particular, the author tries to explore a central research question: Is there a need for a unified European code for consumer ADR? To answer this, it is essential to examine the scope and effectiveness of such tools, the procedural rules in place, and, crucially, whether the 'right to an effective remedy' under EU law has been adequately respected. To provide a comprehensive and nuanced perspective on the matter, special attention will be given to the potential creation of a European unified code, with a focus on enhancing the effectiveness of consumer protection. In this regard, the paper will also consider the Italian perspective, where the government has proposed the establishment of a unified legal framework for ADR mechanisms, known as the TUSC (Testo Unico dei Sistemi di Conciliazione). Despite being explicitly outlined in Article 1, paragraph 4, letter b, of Law Delegation No. 206/2021, this proposal has yet to be implemented.

KEYWORDS: italian justice; EU; ADR; consumer claims.

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SUMMARY: 1. THE LANDSCAPE OF ADR SYSTEMS AND THE JUDICIAL FRAGMENTATION OF JURISDICTION.— 2. THE CRISIS OF JUSTICE AND THE INFLUENCE OF THE ECONOMIC SYSTEM: THE IMPACT OF THE EUROPEAN POLICIES.— 3. THE CONSUMER ADR DIRECTIVE 2013/11/UE AND THE APPROACH OF THE ITALIAN LEGISLATOR: KEY CONSIDERATIONS.— 4. A FURTHER ACCELERATION OF THE ADR IN THE ITALIAN JUDICIAL CONTEXT: THE S. C. CARTABIA JUSTICE REFORM (LEGISLATIVE DECREE N. 149 OF 10 OCTOBER 2022).— 5. SOME BRIEF THOUGHTS.— BIBLIOGRAPHY CITED.

1. THE LANDSCAPE OF ADR SYSTEMS AND THE JUDICIAL FRAGMENTATION OF JURISDICTION

The out-of-court settlement of disputes has long held a prominent position in civil society, gradually evolving into an important alternative – often described as ‘complementary’ – to ordinary court proceedings¹. This issue is particularly significant in countries where the delays in judicial processes have reached such pathological proportions that they essentially result in a denial of justice². This phenomenon, as widely acknowledged, has become especially evident in Italy³, where recent regulatory reforms have focused primarily on addressing the crisis within the civil trial system.

The core legislative intention behind these reforms has been to create a more efficient, non-judicial system of dispute resolution, fostering the ‘fragmentation of jurisdiction’ in justice⁴. In this context, methods such as mediation, conciliation, assisted negotiation, and arbitration were introduced as essential tools aimed at reducing the overburdened judicial system. The formal complexity and rigidity of civil trials, based on established procedural rules, have further exacerbated the crisis in civil justice. With trials characterized by excessive delays and burdensome formalities, the role of the judge has gradually shifted towards a more passive, spectator-like position, thereby diminishing the authority of judicial rulings.

Faced with this *impasse* in litigation, for several decades now, the topic of alternative dispute resolution methods, or *ADR*, according to the English acronym ‘*Alternative Dispute Resolution*’, has constituted one of the great topics of international legal literature⁵. *ADR* is a broad category encompassing

¹ Danovi, F., Ferraris, F. (2018). *ADR una giustizia complementare*. Giuffrè Editore.

² Trocker, N. (2007). La conciliazione come metodo alternativo di risoluzione delle controversie nell’esperienza dell’ordinamento italiano tra obiettivi di politica legislativa e profili di compatibilità costituzionale. In Varano, V. (eds), *L’altra giustizia* (p. 319). Giuffrè Editore.

³ See above Sciacca, M. (2007) Gli strumenti di efficienza del sistema giudiziario e l’incidenza della capacità organizzativa del giudice. In *Riv. dir. proc.*, vol. 62, n. 3 (p. 644), in which the author states that «*Italy is actually sadly at the bottom of the rankings that compare it not only with other countries in the European Union, but even in the world. We are faced with backlogs of millions of cases and trials that last for years*».

⁴ See, in this sense, Decree-Law No. 132 of 12 September 2014 — subsequently converted into Law No. 162 of 10 November 2014 —, on «*misure urgenti di degiurisdizionalizzazione ed altri interventi per la definizione dell’arretrato in materia di processo civile*».

⁵ In our system, authors such as Mauro Cappelletti and Michele Taruffo have the merit of having cultivated the culture of out-of-court dispute resolution techniques. See in this regard: Cappelletti, M.,

a variety of processes designed to help the parties reach a resolution in a more informal and flexible setting than traditional litigation⁶.

ADR instruments can be divided into two main categories: autonomous and heteronomous procedures. Autonomous methods focus on achieving an agreement between the parties themselves, often referred to as 'self-settlement'. These processes do not involve a determination of legal rights and wrongs but rather aim to satisfy the interests of the parties involved, allowing them to craft their own resolution. In contrast, heteronomous procedures rely on a third-party decision-maker to impose a legally binding resolution. This includes arbitration, where the decision is imposed on the parties after hearing arguments from both sides. The distinction between these two categories is crucial, as it determines the role of the third-party in dispute resolution.

It is essential to note that when referring to ADR, we are speaking of various⁷ methods that serve as alternatives to the traditional court process. Mediation, for example, involves a neutral third-party helping parties communicate and reach an agreement, whereas arbitration involves a third-party making a binding decision after evaluating the case. While mediation and conciliation are viewed as non-adjudicative and consensual, arbitration remains an adjudicative mechanism. This variety within ADR systems reflects the flexibility and adaptability of these methods to different types of disputes and parties involved.

The origins of ADR mechanisms trace back to the United States, where they were initially developed to address the growing dissatisfaction with the formal court system⁸. The turning point in the development of ADR came during the 1976 Minneapolis⁹ conference on the 'Causes of Popular Dissatisfaction with the Administration of Justice,' where concerns were raised about the inefficiency of courts to handle the rapidly increasing number of civil disputes¹⁰. The idea was proposed to reduce the caseloads of courts by

Garth, B. (1978). Access to Justice: A World Survey. Giuffrè Editore; Taruffo, M. (7 February 1997). La composizione della lite: la conciliazione, in *Relazione al convegno organizzato dalla Camera arbitrale di Milano*.

⁶ Luiso, F. P. (2022). La risoluzione non giurisdizionale delle controversie in *Diritto processuale civile V*, (p. 3 ff.) Giuffrè Editore.

⁷ For an identification of ADR models distinguishing between self-determined and externally governed ADRs, between adjudicative and facilitative ADRs, between extrajudicial and within the proceedings ADRs, or even between compulsory and optional ADRs, see *supra* [footnote 2], Danovi, F., Ferraris, F. (2018). ADR una giustizia complementare. Ivi (p.18 ff.).

⁸ Silvestri, E. (1999). Osservazioni in tema di strumenti alternativi per la risoluzione delle controversie. In *Riv. trim. dir. proc. civ.*, vol. 1, (p. 321); see also Chase, O. G. (2007). I metodi alternativi di soluzione delle controversie e la cultura del processo: il caso degli Stati Uniti d'America. In Varano, V. (eds), *L'altra giustizia* (p. 129 ff.). Giuffrè Editore.

⁹ See in this regard Levin, L., Wheeler, R. R. (1979). *The Pound Conference: Perspectives on Justice in the Future*. St. Paul, Minnesota, West Publishing Company.

¹⁰ Cf. *supra* [footnote 9], Chase, O. G. *Alternative Methods of Dispute Resolution and the Trial Culture: The Case of the United States of America*. Cit., (p.141), the author states «that the quantity of cases is increasing is clearly demonstrable. Between 1962 and 1974, the number of civil cases com-

removing certain matters from the jurisdiction of courts, thereby delegating them to private, alternative decision-making bodies. This movement toward ‘differentiated’¹¹ protection systems was designed to provide more efficient and less formal resolutions to disputes.

Though the ADR model has been lauded for its potential, it has not been without criticism. Critics argue that a widespread reliance on ADR could lead to the erosion of certain legal guarantees, particularly with respect to due process and the impartiality of the decision-makers. Despite these concerns, ADR systems have continued to gain prominence, not only in the United States but also in Europe and other parts of the world. The development of ADR systems has become a focal point for both European¹² and domestic legislators¹³, who have recognized the need to integrate these mechanisms into national and international legal frameworks.

However, one significant issue remains: the lack of a clear, universally accepted definition of ADR. The term itself encompasses a wide array of mechanisms, and there is no singular, comprehensive definition. The 1998 Alternative Dispute Resolution Act (art. 3) defines ADR as any process in which a neutral third party facilitates dispute resolution outside of the courtroom, including methods like mediation and arbitration. Similarly, the English Civil Procedure Rules describe ADR as a collective term for dispute resolution methods that fall outside the traditional trial process¹⁴. This lack of clarity in definition poses challenges for both practitioners and parties involved, as it could impact their understanding of the available methods and influence their decision-making.

Despite these challenges, ADRs¹⁵ remain a crucial element of modern legal systems. In Italy¹⁶, for example, the introduction of mediation through Legislative Decree No. 28 of 2010 was aimed at alleviating the burden on the judicial system and shortening trial times. The Italian government sought to reduce the number of civil litigation cases by encouraging parties to resolve

menced in federal district courts each year doubled from 50,000 to over 100,000. And the ratio of cases initiated to population doubled as well, from 260 per million US citizens to about 500 per million»; even Hall, K. L. (1989). *The Magic Mirror: Law in Americana History*, (p. 223). Oxford University Press; see also Sander, F. E. A. (1979). *Varieties of Dispute Processing*, in *The Pound Conference*. In Levin, L., Wheeler, (eds) *The Pound Conference: Perspectives on Justice in the Future*, (p. 65). St. Paul, Minnesota, West Publishing Company.

¹¹ Proto Pisani A. (1979). Sulla tutela giurisdizionale differenziata. In *Riv. dir. proc.*, (p. 537).

¹² See Directive No. 52 of 21 May 2008.

¹³ Luiso, F. P. (2011). Giustizia alternativa o alternativa alla giustizia. in *Il Giusto proc. civ.*, (p. 325).

¹⁴ Benigni, F. Franzini F. (2004). *Composizione delle controversie commerciali con le procedure “ADR”*. Giuffrè Editore.

¹⁵ Cf. Silvestri, E. (2020). Risoluzione delle controversie e alternative al processo: un’introduzione teorica, in *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*, (p. 2). Giappichelli Editore.

¹⁶ Rovelli, L. (2009). La crisi della giustizia civile. Diagnosi e terapie. In *Giur. It.*, n. 2, (p. 515), in which the author reports some numerical data claiming that «civil cases pending in Italy at the end of 2006 were about five million, in Spain 5700,000, in France 1,400.00 (including commercial cases pending before the *Tribunal de Commerce*, made up of “merchants”, and labour cases entrusted to “proud’hommes”)».

disputes outside of court. Under this framework, mediation¹⁷ is defined as a process in which an impartial third party assists parties in seeking an amicable settlement of a dispute, while conciliation is seen as a final step in the dispute resolution process, where a settlement agreement is reached through mediation¹⁸. This distinction emphasizes the role of ADR in fostering amicable dispute resolution, thereby addressing the systemic issues that plague the formal court system¹⁹.

In the broader European context, ADR has been increasingly integrated into legal frameworks, particularly through EU directives and regulations designed to harmonize dispute resolution mechanisms across member states. The EU has recognized the importance of ADRs in providing consumers with accessible and efficient means of resolving disputes, particularly in cross-border situations. The ongoing development of the ADR legislation, however, has not been without its challenges. There remains a significant debate as to whether a unified European code for ADR is necessary to ensure consistent standards and protect the rights of consumers across member states.

On the whole, while ADR systems offer a promising alternative to traditional court proceedings, they are not without challenges. The lack of a universal definition, concerns over due process guarantees, and the need for further harmonization of ADR²⁰ laws are key issues that require ongoing attention. Nevertheless, the evolution of ADR reflects a growing appreciation of the need for flexible, accessible, and efficient dispute resolution mechanisms in modern legal systems. The ongoing legislative efforts at both the national and international levels, particularly in Europe, will likely continue to shape the future of ADR, offering a balanced approach to resolving disputes outside of the courtroom.

2. THE CRISIS OF JUSTICE AND THE INFLUENCE OF THE ECONOMIC SYSTEM: THE IMPACT OF THE EUROPEAN POLICIES

The evolution of European policies on alternative dispute resolution (ADR) is grounded in the acknowledgement that the judicial process alone is often insufficient to deliver timely and effective justice. There is a growing need for fast, efficient, and low-cost procedures that still ensure the protection of the parties involved, comparable to what traditional judicial methods offer. This

¹⁷ Dittrich, L. (2010). Il procedimento di mediazione nel d.lgs. n. 28 del 4 marzo 2010. In *Riv. dir. proc.*, (p. 575).

¹⁸ Ghirga, M.F. (2009). Strumenti alternativi di risoluzione della lite: fuga dal processo o dal diritto? (Riflessioni sulla mediazione in occasione della pubblicazione della Direttiva 2008/52/CE). In *Riv. dir. proc.*, vol. 2 (p. 357 ff.).

¹⁹ Cf. Cuomo Ulloa, F. (2008). La conciliazione. Modelli di composizione dei conflitti, (p. 459 ff.). Cedam Editore.

²⁰ Punzi, C. (2009). Mediazione e conciliazione?. In *Riv. dir. proc.*, vol. 4 (p. 845 ff.).

awareness has encouraged the development of ADR as a complementary tool to judicial processes, ensuring the resolution of disputes without compromising the quality of protection²¹.

Although the statutory landscape surrounding ADR within the European Union (EU) has been fragmented and incomplete, particularly in the area of consumer protection, various initiatives have laid the foundation for broader, more coherent regulatory frameworks. These initiatives include significant references to ADR in documents like the 1993 Green Paper on consumer access to justice, the 1997 Directives on cross-border credit transfers (97/5/EEC)²² and distance contracts (97/7/EEC)²³, and two important recommendations adopted by the Commission in 1998 and 2001. These early steps were instrumental in raising awareness of ADR mechanisms, but they remained isolated and insufficient in ensuring widespread adoption among businesses and consumers. As a result, the European Commission proposed a more comprehensive approach in 2011²⁴, introducing a directive on consumer ADR. This proposal was an acknowledgment that prior actions were insufficient in instilling the necessary consumer confidence in the EU's internal market.

The EU has shown consistent commitment to consumer protection by fostering sector-specific regulations that guarantee high levels of consumer security within the internal market²⁵. These efforts have often included the promotion of ADR models, emphasizing speed, simplicity, and cost-effectiveness. The EU has also focused on resolving cross-border disputes by creating mechanisms to avoid jurisdictional conflicts between Member States, facilitating cooperation among them in protecting consumer rights²⁶.

In the Italian legal system, ADR has seen steady growth, driven by the need to make legal protections more immediate and effective while addressing the excessive formality of traditional trials. The increasing importance of ADR is also motivated by the desire to move beyond national borders and incorporate extra-judicial tools that have long been present in various legal systems²⁷. Italy's introduction of a uniform mediation procedure through Legislative Decree 28/2010 marks a significant milestone in the national ADR landscape. This reform aimed to broaden the scope of ADR models, particu-

²¹ Cf. Danovi, R. (1997). Le ADR (Alternative Dispute Resolutions) e le iniziative dell'Unione europea. In *Giur. It.*, vol. 4 (p. 1032).

²² See the full text at <https://eur-lex.europa.eu/legal-content/IT/TXT/?uri=CELEX:31997L0005>

²³ Available at <https://eur-lex.europa.eu/legal-content/IT/TXT/HTML/?uri=CELEX%3A31997L0007>.

²⁴ Cf. Gioia, G. (2012). Un nuovo "pacchetto" della Commissione europea sull'ADR. In *Il Corr. Giur.*, (p. 700 ff.).

²⁵ See Silvestri, E. (2020). Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa. *Cit.*, (p. 86 ff.)

²⁶ In fact, EU law, with the aim of facilitating recourse to ADR procedures and offering support to consumers involved in a dispute - especially in cross-border disputes to which the directive intends to refer - while providing for the possibility for traders operating within a Member State to avail themselves of ADR bodies based in other Member States, also 'requires' them to strengthen the FIN-NET and ECC-NET systems.

²⁷ Danovi F. (2013). *Arbitrato online*. Rubino Sammartano, M. (eds), *Arbitrato, ADR, Conciliazione*, (p. 441). Zanichelli Editore.

larly for financial disputes involving professionals and consumers. Notably, Directive 2013/11/EU on alternative dispute resolution for consumer disputes²⁸, which Italy incorporated into national law with Legislative Decree No. 130/2015, stands as a key development in ADR practice.

The directive, in particular, represents the current state of the art in ADR²⁹. It clearly defines its objective of enhancing consumer protection while ensuring the proper functioning of the internal market. The directive seeks to make alternative dispute resolution accessible to consumers across Member States, with mechanisms that respect EU quality standards. In this context, it emphasizes voluntary, independent, and impartial ADR bodies that provide transparent, rapid, and effective procedures for resolving disputes³⁰. Importantly, the directive³¹ requires Member States to promote³² ADR mechanisms for all disputes involving consumer rights, including establishing a 'residual' ADR model to handle disputes not covered by specific forms of ADR (Article 5, para. III)³³.

An important aspect of the directive is its emphasis on online dispute resolution (ODR), which is specifically addressed in Regulation No. 525/2013. This regulation establishes an EU ODR platform³⁴ designed to facilitate the out-of-court resolution of disputes arising from e-commerce³⁵. This initiative aims to ensure uniformity across the EU in handling e-commerce-related consumer disputes, offering a seamless online experience for consumers and traders alike.

²⁸ Cf. Ferraris, F. (2018). ADR e consumatori. In *ADR una giustizia ripartiva*, cit., (p. 323).

²⁹ See Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Cit., (p. 87).

³⁰ The reference is to the terms used by the European legislator in Directive 2013/11/EU, Chapter I (General Provisions), Article 1 in which it is stated that: «*The objective of this Directive is to contribute, through the achievement of a high level of consumer protection, to the proper functioning of the internal market by ensuring that consumers can, on a voluntary basis, submit complaints against traders to bodies offering independent, impartial, transparent, effective, rapid and fair alternative dispute resolution procedures*».

³¹ See *Considerando* (5), available at <https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32013L0011>.

³² See *Considerando* (7) of Directive 2013/11/EU stating the following: «In order for consumers to benefit from the full potential of the internal market, ADR should be available for all types of disputes, domestic and cross-border, covered by this Directive, ADR procedures should meet the quality requirements that apply throughout the Union and consumers and traders should be aware of the existence of such procedures. In view of the increase in cross-border trade and movement of persons, it is also important that ADR schemes deal with cross-border disputes in an effective manner».

³³ See also in this respect the wording of *Considerando* (24) which states «(omissis) This Directive should not oblige Member States to create specific ADR schemes for each retail sector: Where necessary, in order to ensure full sectoral and geographical coverage and access to ADR, Member States should have the possibility to provide for the creation of a residual ADR entity to deal with disputes for the resolution of which no specific ADR entity is competent. Residual ADR entities constitute a guarantee for consumers and traders that there is no gap in access to an ADR entity».

³⁴ It is a platform accessible from <http://ec.europa.eu/consumers/odr/>, available since 15 February 2016.

³⁵ According to recital (8) of the Regulation, in fact, «ODR offers an easy, effective, quick, and low-cost out-of-court solution for disputes arising from online transactions».

The directive also highlights several essential principles that should characterize ADR procedures, focusing on access to justice, fairness, and procedural effectiveness. A key principle is that ADR procedures must be easily accessible and free of charge for consumers. Moreover, the procedures should be concluded within a reasonable timeframe, generally within 90 days, with possible extensions only in the case of complex disputes. Furthermore, the directive mandates that ADR bodies must be independent and impartial, possessing the necessary expertise in either judicial or alternative dispute resolution (Article 6). Transparency then is another critical requirement.

The directive, in fact, ensures that the procedures are clear and comprehensible for consumers, who must be provided with all necessary information about the ADR process and the entities involved (Article 7). The goal is to allow consumers to make informed decisions about which ADR mechanism to use based on factors such as the type of dispute and the expertise of the ADR body.

In the purposes of the Directive, then, equally important is the principle of fairness, which involves ensuring that the adversarial process is respected, and that both parties have an equal opportunity to present their cases. The directive ensures that consumers are not required to hire a lawyer or legal representative to participate in ADR procedures (Article 8). This provision aligns with the broader aim of making ADR accessible and user-friendly, thereby removing barriers to entry for consumers who may not have legal expertise. Furthermore, the directive ensures that consumers can withdraw from the ADR process at any point, without facing detrimental consequences. This is vital for ensuring that the process remains voluntary and that the parties involved fully understand the potential outcomes before agreeing to a resolution.

The directive also contains provisions that safeguard the legality and freedom of participants³⁶. It guarantees that consumers are free to withdraw from the ADR process at any stage, ensuring that they are not bound by resolutions that they did not fully understand or accept. These safeguards are designed to prevent any undue pressure on consumers and to maintain the integrity of the dispute resolution process. Another key aspect of the EU's ADR framework is the flexibility allowed to Member States regarding the mandatory nature of mediation. Directive 52/2008/EC and Directive 2013/11/EU both emphasize that national legislation³⁷ may mandate mediation or incentivize its use before or after judicial proceedings, provided that such requirements do not restrict access to judicial remedies. This flexibility ensures that Member States have the autonomy to tailor ADR mechanisms to their legal systems while respecting the fundamental rights of the parties involved.

³⁶ Cf. Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Cit., (p. 89).

³⁷ In https://conciliatorebancario.it/images/allegati/direttiva_adr.pdf. For more on consumer dispute mediation, see also the writing of Scannicchio, N. (2015). *La mediazione delle controversie di consumo nella direttiva europea 2013-11*, (p. 151 ff.). Giappichelli Editore.

In this scenario, the European Court of Justice has weighed in on the issue of mandatory mediation, particularly in the *Alassini and Others v. Telecom 38* case. The court³⁹ ruled that mandatory mediation does not violate the right to a fair trial⁴⁰, as long as it serves a legitimate public interest and does not prevent access to the courts⁴¹. This ruling underscores the EU's commitment to conciliation, recognizing its value in resolving disputes efficiently while maintaining the right to judicial recourse.

In Italy, the implementation of Directive 2013/11/EU has not been without challenges. Legislative Decree No. 130/2015, which aligns Italian law with the Directive, has revealed some complexities, particularly regarding the interaction between consumer ADR and other domestic ADR mechanisms, such as civil and commercial mediation under Legislative Decree 28/2010. The attempt to harmonize these systems has not fully achieved its intended goal of simplifying the ADR landscape. Despite efforts to streamline ADR⁴² processes for consumers, the law still features overlapping frameworks and procedural requirements, making it difficult to navigate the various ADR options available.

With this in mind, while the adoption of ADR frameworks at the EU level represents significant progress in consumer protection and dispute resolution, challenges remain in fully harmonizing these mechanisms across Member States. The ongoing evolution of ADR within the EU and Italy's legal system highlights the need for continued refinement to ensure that alternative dispute resolution is as accessible, efficient, and effective as possible for consumers. The European legislative framework offers a robust foundation, but its successful implementation relies on ongoing cooperation and adaptation to meet the needs of consumers in an increasingly complex legal and commercial landscape.

³⁸ See <https://curia.europa.eu/juris/document/document.jsf?jsessionid=0F84E52DB732C3533EB448AE0F4A40EC?text=&docid=79647&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&id=3575192>.

³⁹ See in this respect the content of paragraph 63 of the decision in which the Court specifies that: «Nevertheless, it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed (see, to that effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, paragraph 75 and the case-law cited, and the judgment of the ECHR in *Fogarty v United Kingdom*, no. 37112/97, §33, ECHR 2001-XI (extracts)).»

⁴⁰ See Article 6(1)(I), entitled «Right to a Fair Trial», which states: «Everyone has the right to have his or her case heard fairly, publicly and within a reasonable time by an independent and impartial tribunal constituted by law to decide upon disputes concerning his or her civil rights and obligations or the merits of any criminal charge against him or her»; also available at https://www.echr.coe.int/documents/d/echr/convention_ita.

⁴¹ See Charter of Fundamental Rights of the European Union, Title VI (Justice), Article 47 «*Right to an effective remedy and to a fair trial*», which reads as follows «Everyone whose rights and freedoms guaranteed by the law of the Union have been violated shall have an effective remedy before a court or tribunal, subject to the conditions set out in this Article».

⁴² See Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Ivi, (p. 92 ff.)

3. THE CONSUMER ADR DIRECTIVE 2013/11/EU AND THE APPROACH OF THE ITALIAN LEGISLATOR: KEY CONSIDERATIONS

In Italy, with Legislative Decree No. 130/2015, the domestic legislator has had the opportunity to simplify, with specific reference to consumer disputes, the limits within which consumer ADRs do not constitute an obstacle to the need for a swift settlement of disputes, expressly providing in the amended Article 141, paragraph 6, of the Consumer Code⁴³, that «the provisions providing for the compulsory nature of the out-of-court settlement of disputes shall not be affected», especially Article 5, paragraph *1-bis*, of Legislative Decree No. 28/2010 relating to civil and commercial mediation in cases where it is provided for as a condition for the admissibility of the court proceedings. However, in the relationship between Legislative Decree No. 28/2010 and Directive 2013/11/EU, the provisions of which are now contained in the Consumer Code, there remain quite a few problems.

Certainly, it can be understood how the implementation of the ADR Directive, by the domestic legislator, was welcomed, since it aimed at making available to the consumer a multiplicity of alternative dispute resolution models with respect to the trial and -above all- because it should have led to a reinterpretation of the domestic regulations on civil and commercial mediation, removing consumer disputes from the operational scope of compulsoriness. However, this did not happen: Legislative Decree No. 130/2015, in fact, opted for the coexistence of regulatory regimes in the area of consumer disputes, subjecting them to a concurrence of rules -between consumer ADR and civil mediation- whose contrast should be resolved in the sense of the prevalence of the principles of enhanced protection proper to consumer law.

If what has been said could be considered reasonable in the case of a regulatory contrast, it nevertheless does not solve the problem ambitious, where the various methods of alternative dispute resolution presuppose a thorough knowledge of each of them on the part of the consumer, and there does not seem to be a degree of awareness such as to induce the parties to identify the ADR entity most suited to the needs of that specific dispute⁴⁴. It

⁴³ Art. 141(6) of the Consumer Code: «6. The following provisions providing for the compulsory nature of out-of-court dispute resolution procedures shall remain unaffected (a) Article 5, paragraph *1-bis*, of Legislative Decree no. 28 of 4 March 2010, which regulates the cases of procedural conditions with reference to mediation aimed at the conciliation of civil and commercial disputes; (b) Article 1, paragraph 11, of Law no. 249 of 31 July 1997, which provides for the mandatory attempt at conciliation in the electronic communications sector; (c) Article 2, paragraph 24, letter b), of Law no. 481 of 14 November 1995, which provides for the compulsory attempt at conciliation in matters falling within the competence of the Regulatory Authority for Electricity, Gas and the Water System, and whose modalities are regulated by the Regulatory Authority for Electricity, Gas and the Water System by means of its own provisions».

⁴⁴ Cf. Silvestri, E. (1999). Osservazioni in tema di strumenti alternativi per la risoluzione delle controversie. *Cit.*, (p. 321 ff.).

cannot be denied that this represents one of the major disadvantages of ADR procedures since, as pointed out by the doctrine⁴⁵, when the legal system makes available to the parties a diversity of alternative models to the process, it may be problematic to choose the most suitable instrument for the case in question, especially when the choice is made autonomously, i.e. without the support of legal assistance.

In instances where the legislature has failed to establish specific rules governing the decisional phase, it has become necessary for the parties to 'start anew.' This, however, leads to undeniable consequences for the justice system that are seldom discussed: a loss of public trust in Alternative Dispute Resolution (ADR) mechanisms, escalating conflicts, unnecessary delays in proceedings, and a breach of the principle of legal certainty. This principle is undermined in situations where a dispute, after being submitted to an ADR body, is subsequently reintroduced before the court of merit, leaving the outcome uncertain.

Thus, the potential for seeking judicial intervention creates a cyclical pattern, akin to a pendulum, swinging between the desire to rely on ADR and the need to resort to ordinary justice to obtain a final decision. Moreover, this often results in a judgment that conflicts with the decision rendered by the 'complementary' dispute resolution mechanism.

It is clear that such a system lacks inherent coherence, as it fails to guarantee consumers – and, more broadly, citizens – a sufficient degree of legal certainty in out-of-court dispute resolution, irrespective of the ADR process selected. This is particularly significant in the pursuit of judicial efficiency, as these alternative models of protection reflect a level of specialization that ordinary courts are unable to provide, especially in sectors like finance, where the requisite expertise is typically absent.

4. A FURTHER ACCELERATION OF THE ADR IN THE ITALIAN JUDICIAL CONTEXT: THE S. C. CARTABIA JUSTICE REFORM (LEGISLATIVE DECREE N. 149 OF 10 OCTOBER 2022)

It is now necessary to examine, although without any presumption of exhaustiveness, the legislative interventions aimed at addressing the critical issues that have plagued the civil process over time: lengthy proceedings, the efficiency and fairness of decisions, and the balancing of interests, a task which proves exceedingly difficult, even with the intervention of reforms. The recent legislative steps, therefore, deserve a careful analysis, particularly in light of the changes that were introduced to streamline the judicial process while ensuring adequate protection of fundamental rights.

⁴⁵ Silvestri, E. (2020). *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*. Cit. (p. 9).

The reform of the civil process, set forth by Delegated Act No. 206 of November 26, 2021, titled «Delegation to the Government for the Efficiency of the Civil Process and for the Regulation of Alternative Dispute Resolution (ADR) Instruments, and Urgent Measures for the Rationalization of Proceedings in Matters of Personal and Family Rights, as well as Forced Execution», marks a crucial moment in the legislative approach to civil justice. This was followed by Legislative Decree No. 149 of October 10, 2022⁴⁶ – commonly known as the ‘Cartabia Reform’ – which places further emphasis on improving procedural efficiency, including the reorganization of ADR mechanisms⁴⁷. This strategic shift has sought to consolidate alternative tools for dispute resolution with the broader aim of enhancing procedural efficiency⁴⁸, a goal long sought after within the Italian legal system⁴⁹.

As outlined in the Illustrative Report accompanying the reform, the legislative decree aims to reorganize both the formal and substantive aspects of the adjudicative civil process. In accordance with the objectives set forth by the enabling law, the reform advocates for the simplification, acceleration, and rationalization of procedures, as key elements that are intended to support ‘the value of the effectiveness of judicial protection’. These objectives underscore the reform’s commitment to improving access to justice, while acknowledging the complex balance between procedural efficiency and the guarantees of due process.

The reform touches on numerous issues of both systemic importance and practical implications. These provisions will not only affect the clarity and precision of procedural acts but will also impose penalties for abuse of the process and introduce new variants of the adjudicative process. Furthermore, one of the most significant changes – particularly relevant to the subject matter of this analysis – is the newly restructured regulation of various ADR instruments that were already in common use.

In the context of ordinary civil proceedings, a notable modification introduced by the new paragraph 3-*bis* of Article 163 of the Civil Procedure Code is that the summons must, although not under penalty of nullity, contain ‘an indication of the fulfilment of the conditions for admissibility where applicable’. This reform mandates that the plaintiff consider whether the application is admissible before filing, as the legislature has introduced further mandatory conciliation attempts, now stipulated in Article 5(1) of Legislative Decree No. 28/2010. This includes not only traditional disputes but now also encompass-

⁴⁶ See in this regard the work of Cecchella C. (2023). *Il processo civile dopo la riforma*. Legislative Decree No. 149 of 10 October 2022. Zanichelli Editore.

⁴⁷ For a comprehensive discussion of the amendments made by Legislative Decree no. 149/2022, see Carratta A. (2023). *Le riforme del processo civile*. Giappichelli Editore.

⁴⁸ Ghirga, M. F. (2023) *L’abuso del processo e alcune norme nell’ultima riforma della giustizia civile*. In *Riv. dir. proc.*, vol. 2 (2), (p. 390 ff.).

⁴⁹ Donzelli, R. (2023). *Considerazioni sparse sulla riforma del processo civile: disposizioni generali, processo di cognizione, appello e cassazione*. In *Giust. civ.*, vol. 2 (p. 413 ff.).

ses issues arising from partnership contracts⁵⁰, consortium contracts, franchising agreements, labor contracts, network contracts, supply agreements, and subcontracting contracts. The reform broadens the scope of mandatory ADR tools that are now required before a lawsuit can proceed to court.

In practical terms, the legislature provides that the defendant may object to the inadmissibility of the claim, and the court may identify the issue of inadmissibility *ex officio* during the first hearing. Should the admissibility condition not be satisfied, the court is authorized to declare the application inadmissible at that hearing. However, the reform provides for certain exceptions, specifically where the parties have engaged in the procedure set out in Article 128-*bis* of Legislative Decree No. 385/1993. In the financial sector, this continues to rely on conflicting provisions governing both ‘general mediation’ and alternative dispute resolution systems⁵¹ specifically aimed at consumers.

In addition, the reform seeks to strengthen the incentives for mediation by introducing more robust reward mechanisms while imposing stricter sanctions for behaviors that obstruct mediation itself. The mandatory nature of legal representation during ADR processes is also reinforced. Although the reform offers numerous points of intervention on mediation, these fall outside the immediate scope of this discussion. Nevertheless, it is important to mention the intervention of the Cartabia reform with regard to assisted negotiation, which represents a pivotal ADR instrument in the Italian legal framework.

Regarding negotiation, the reform introduces a critical change in its designation, renaming the procedure as the ‘negotiation agreement assisted by lawyers’. The new provisions now require the inclusion of the dispute’s value within the agreement itself. The reform also expands the scope of this institution to include labor disputes, although without making legal claims in such matters inadmissible. Furthermore, it allows for the performance of a limited investigative activity within the negotiation procedure itself, alongside specific rules for its conduct. These changes reflect a significant evolution in the way negotiation can be utilized within the broader ADR landscape⁵².

⁵⁰ On this point cf. Miccolis, G. (2023). Le nuove norme in tema di mediazione e negoziazione assistita. In *Riv. dir. proc.*, vol. 3 (p.1059); also Dalmotto, E. (2023). Riforma Cartabia: il nuovo processo civile (II parte) - La negoziazione assistita nell’ultima riforma della giustizia civile. In *Giur. It.*, vol. 3, (p. 739 ff.).

⁵¹ Miccolis, G. (2023). Le nuove norme in tema di mediazione e negoziazione assistita. *Cit.*, (p.1059 ff.), in which the author states how the reform has clarified that «the presence of the lawyer is compulsory only in the event that the attempt at conciliation is provided for under penalty of inadmissibility of the court application, limited to the hypotheses provided for by art. 5, paragraph 1 and 5 -quarter (mediation requested by the judge), legislative decree no. 28/2010, while it implicitly excluded the mandatory nature of the presence of the lawyer in the case provided for by Article 5-*sexies* (mediation on contractual or statutory clause) legislative decree no. 28/2010 and when the attempt at conciliation is optional... (*omissis*). This clarification on the mandatory nature of the technical defense renders consistent the provision contained before the reform in the second part of paragraph 1 of article 12, legislative decree no. 28/2010, and now contained in paragraph 1bis always of article 12, legislative decree no. 28/2010 on the subject of the enforceability of the conciliation report not signed with the lawyers».

⁵² For further discussion see Dalfino, D. (2021). Mediazione e negoziazione assistita. Costantino G. (eds), *La riforma della giustizia civile. Prospettive di attuazione della legge 26 novembre 2021, n. 206*, (p.37

The reform clearly signals the legislature's intent to enhance complementary justice instruments, specifically ADRs, by expanding their applicability into areas previously excluded or governed by more restrictive rules. Both mediation and assisted negotiation have been redefined and enhanced under the new legislative framework, providing new opportunities for alternative methods of dispute resolution that go beyond traditional litigation. However, despite these significant strides, the ADR category remains somewhat fragmented and lacks a unifying principle⁵³. Even following the recent legislative intervention, there is no clear and consistent framework to which all alternative dispute resolution mechanisms must adhere, leading to a somewhat disjointed ADR system.

As mentioned earlier, in addition to the traditional ADR methods – such as conciliation, arbitration, and contentious administrative proceedings – Italy's legal framework now includes 'mediation for the conciliation of civil and commercial disputes' (Legislative Decree No. 28/2010) and lawyer-assisted negotiation (Law No. 162/2014). These methods were also subject to recent reforms led by Minister Marta Cartabia, which aimed to clarify their application and scope, thereby reducing litigation and fostering the use of ADRs in an ever-expanding range of legal matters.

One notable exclusion from the recent reform concerns Legislative Decree No. 130 of August 6, 2015, which was issued to implement Directive 2013/11/EU regarding alternative dispute resolution for consumer disputes. This decree, which amended Regulation (EEC) No. 2006/2004 and Directive 2009/22/EEC, was not addressed by the recent reform. Specifically, the financial sector's ADR landscape remains diverse, with a range of unresolved conflicts and inconsistencies between the various mechanisms in place for resolving disputes. These include mediation, arbitration, and conciliation, among others.

Of particular interest is the reform's failure to realize the long-discussed introduction of a single text governing alternative dispute resolution instruments, the so-called TUSC (Testo Unico sugli Strumenti di Conciliazione), which had been expressly provided for under Article 1(4)(b) of Delegated Law No. 206/2021⁵⁴. Despite being included among the reform's guiding princi-

ff.); see also the analysis conducted by Ficarelli, B. Istruzione stragiudiziale nella negoziazione assistita da avvocati. Nuova sfida culturale per il legislatore italiano e metodi complementari di risoluzione delle controversie. In *Riv. trim. dir. proc. civ.*, vol. 77 (2), (pp. 503-535).

⁵³ See *supra* [footnote 3] Trocker, N. (2007). La conciliazione come metodo alternativo di risoluzione delle controversie nell'esperienza dell'ordinamento italiano tra obiettivi di politica legislativa e profili di compatibilità costituzionale, cit., (p. 317); see also Ficarelli, B. *Istruzione stragiudiziale nella negoziazione assistita da avvocati. New cultural challenge for the Italian legislature and complementary methods of dispute resolution*, cit., (p. 535 ff.).

⁵⁴ The enabling act states the following «4. In the exercise of the delegation of powers referred to in paragraph 1, the legislative decree or decrees amending the regulations on mediation and assisted negotiation procedures shall be adopted in accordance with the following guiding principles and criteria: a) to reorganize and simplify the regulations on tax incentives relating to out-of-court dispute resolution procedures by providing for: an increase in the extent of the exemption from registration tax referred to

ples, the TUSC has yet to materialize into a functional and comprehensive legal framework. This absence represents a missed opportunity to streamline and standardize the diverse ADR landscape in Italy, which continues to be characterized by a multiplicity of rules and practices.

5. SOME BRIEF THOUGHTS

In light of the considerations discussed – and acknowledging that much more could be said, though space limits this investigation – it may still be advisable for the European legislator to intervene in the current complex landscape of ADR. Such an intervention should account for the distinct characteristics of each national system. Indeed, harmonization efforts alone often fail to address the inefficiencies within national systems, potentially undermining the effectiveness of judicial protection at a formal level. Simply having a variety of ADR instruments does not inherently ensure more effective justice; in fact, as evidenced in the Italian context, it can undermine legal certainty.

Therefore, a European legislative initiative aimed at establishing a unified ADR code, one that balances not only the efficiency of justice in terms of trial duration but, more crucially, the due process protections for the parties involved, could mark a pivotal development in the current ADR framework. This would contribute to achieving the long-sought goal of legislative unification, especially in the realm of due process guarantees, a cornerstone of European Union law.

in Article 17, paragraph 3, of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for determining the tax credit referred to in Article 20 of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for determining the tax credit referred to in Article 20 of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for determining the tax credit referred to in Article 20 of Legislative Decree No. 28 of 4 March 2010; simplification of the procedure provided for in Article 20 of Legislative Decree No. 28 of 4 March 2010. 28; the simplification of the procedure provided for the determination of the tax credit referred to in Article 20 of Legislative Decree 4 March 2010, no. 28 of 4 March 2010, and the recognition of a tax credit commensurate with the remuneration of the lawyer who assists the party in the mediation procedure, within the limits provided for by the professional parameters; the further recognition of a tax credit commensurate with the unified contribution paid by the parties in the case that is extinguished following the conclusion of the mediation agreement the extension of legal aid to the mediation and assisted negotiation procedures; the provision of a tax credit in favor of mediation bodies commensurate with the indemnity not payable by the party that qualifies for legal aid; the reform of the costs of initiating the mediation procedure and of the indemnities due to mediation bodies; monitoring of compliance with the expenditure limit for the measures envisaged which, in the event of any deviation from the said expenditure limit, provides for a corresponding increase in the unified fee; b) with the exception of arbitration, to harmonize, at the outcome of the monitoring to be carried out on the area of application of compulsory mediation, the legislation on out-of-court dispute resolution procedures provided for by the law and, to this end, to bring together all the disciplines in a single text of complementary instruments to the jurisdiction (TUSC), also with appropriate enhancement of the individual competences on account of the matters in which such procedures may intervene; ... (*omissis*). For further details see the content of the enabling act available at <https://www.gazzettaufficiale.it/eli/id/2021/12/09/21G00229/sg>.

BIBLIOGRAPHY CITED

- Benigni, F. Franzini F. (2004). *Composizione delle controversie commerciali con le procedure "ADR"*. Giuffrè Editore.
- Cappelletti, M., Garth, B. (1978). *Access to Justice: A World Survey*. Giuffrè Editore.
- Carratta A. (2023). *Le riforme del processo civile*. Giappichelli Editore.
- Cecchella C. (2023). *Il processo civile dopo la riforma*. Legislative Decree No. 149 of 10 October 2022. Zanichelli Editore.
- Chase, O. G. (2007). *I metodi alternativi di soluzione delle controversie e la cultura del processo: il caso degli Stati Uniti d'America*. In Varano, V. (eds), *L'altra giustizia*. Giuffrè Editore.
- Cuomo Ulloa, F. (2008). *La conciliazione. Modelli di composizione dei conflitti*. Cedam Editore.
- Dalfino, D. (2021). *Mediazione e negoziazione assistita*. Costantino G. (eds), *La riforma della giustizia civile. Prospettive di attuazione della legge 26 novembre 2021, n. 206*.
- Dalmotto, E. (2023). *Riforma Cartabia: il nuovo processo civile (II parte) - La negoziazione assistita nell'ultima riforma della giustizia civile*. In *Giur. It.*, vol. 3, pp. 736-746.
- Danovi F. (2013). *Arbitrato online*. Rubino Sammartano, M. (eds), *Arbitrato, ADR, Conciliazione*. Zanichelli Editore.
- Danovi, F., Ferraris, F. (2018). *ADR una giustizia complementare*. Giuffrè Editore.
- Danovi, R. (1997). *Le ADR (Alternative Dispute Resolutions) e le iniziative dell'Unione europea*. In *Giur. It.*, vol. 4, p. 326 ff.
- Donzelli, R. (2023). *Considerazioni sparse sulla riforma del processo civile: disposizioni generali, processo di cognizione, appello e cassazione*. In *Giust. civ.*, vol. 2, pp. 413-435.
- Dittrich, L. (2010). *Il procedimento di mediazione nel d.lgs. n. 28 del 4 marzo 2010*. In *Riv. dir. proc.*, vol. 3, pp. 575-594.
- Ficcarelli, B. (2023). *Istruzione stragiudiziale nella negoziazione assistita da avvocati. Nuova sfida culturale per il legislatore italiano e metodi complementari di risoluzione delle controversie*, *Riv. trim. dir. proc. civ.*, vol. 77 (2), pp. 503-535.
- Ghirga, M. F. (2023). *L'abuso del processo e alcune norme nell'ultima riforma della giustizia civile*. In *Riv. dir. proc.*, vol. 2(2), pp. 390-424.
- Ghirga, M. F. (2009). *Strumenti alternativi di risoluzione della lite: fuga dal processo o dal diritto? (Riflessioni sulla mediazione in occasione della pubblicazione della Direttiva 2008/52/CE)*. In *Riv. dir. proc.*, vol. 2, pp. 357-379.
- Gioia, G. (2012). *Un nuovo "pacchetto" della Commissione europea sull'ADR*. In *Il Corr. Giur.*, vol. 5, pp. 697-719.
- Hall, K. L. (1989). *The Magic Mirror: Law in Americana History*. Oxford University Press.
- Levin, L., Wheeler, R. R. (1979). *The Pound Conference: Perspectives on Justice in the Future*. St. Paul, Minnesota, West Publishing Company.
- Luiso F. P. (2022). *La risoluzione non giurisdizionale delle controversie in Diritto processuale civile V*. Giuffrè Editore.
- Luiso, F. P. (2011). *Giustizia alternativa o alternativa alla giustizia?* In *Il Giusto proc. civ.*, vol. 6 (2), pp. 325-332.
- Miccolis, G. (2023). *Le nuove norme in tema di mediazione e negoziazione assistita*. In *Riv. dir. proc.*, vol. 3, p. 1058 ff.
- Proto Pisani A. (1979). *Sulla tutela giurisdizionale differenziata*. In *Riv. dir. proc.*, vol. 1, p. 536 ff.
- Punzi, C. (2009). *Mediazione e conciliazione*. In *Riv. dir. proc.*, vol. 4, p. 845 ff.

- Rovelli, L. (2009). La crisi della giustizia civile. Diagnosi e terapie. In *Giur. It.*, n. 2, p. 520 ff.
- Sander, F. E. A. (1979). Varieties of Dispute Processing, in The Pound Conference, In Levin, L., Wheeler, (eds) *The Pound Conference: Perspectives on Justice in the Future*. St. Paul, Minnesota, West Publishing Company.
- Scannicchio, N. (2015). La mediazione delle controversie di consumo nella direttiva europea 2013-11. Giappichelli Editore.
- Sciacca, M. (2007). Gli strumenti di efficienza del sistema giudiziario e l'incidenza della capacità organizzativa del giudice. In *Riv. dir. proc.*, vol. 62, n. 3.
- Silvestri, E. (2020). Risoluzione delle controversie e alternative al processo: un'introduzione teorica, in *Forme alternative di risoluzione delle controversie e strumenti di giustizia riparativa*, (p. 2). Giappichelli Editore.
- Silvestri, E. (1999). Osservazioni in tema di strumenti alternativi per la risoluzione delle controversie. In *Riv. trim. dir. proc. civ.*, vol. 1., p. 336 ff.
- Trocker, N. (2007). La conciliazione come metodo alternativo di risoluzione delle controversie nell'esperienza dell'ordinamento italiano tra obiettivi di politica legislativa e profili di compatibilità costituzionale. In Varano, V. (eds), *L'altra giustizia*. Giuffrè Editore.

