THE AMERICANIZATION OF THE ITALIAN CIVIL PROCEEDINGS?

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While the pandemic was winding down, European countries received substantial funds from the E.U. government to address the increasing economic distress caused by the lockdown period. Consequently, the former Italian government devised an ambitious plan that regards civil justice reform as a strategic tool for gradually obtaining financial resources from the E.U. The approved reform encompasses various aspects, including the renewed framework of the civil proceeding and specific attention to A.D.R., like negotiation or mediation. Considering the core elements of this recent reform, one might question whether the new Italian civil proceeding bears any resemblance to fundamental aspects of the U.S. civil process, despite historical divergences stemming from the inquisitorial and adversarial models of justice. This notion delineates the basis of the article's title, which seeks to explore a two-fold comparison. Firstly, the article aims to elucidate how several key elements of the reform in civil proceedings mirror certain foundational aspects and cornerstones of the U.S. pretrial phase, as they are provided at Federal Level. It endeavors to provide a technical explanation of this comparison, while carefully emphasizing that it does not entail a mere formal transplantation of rules, but rather a shared commonality in the framework and available decision-making tools (such as summary judgment, motion to dismiss, and judicially-led settlement). To this effect, a new semi-global model of civil justice is emerging spontaneously. Secondly, the article aspires to undertake a broader comparative analysis, capitalizing on the growing criticism of the U.S. civil justice system. It intends to caution both systems to improve their interpretation and application of their respective sets of rules in the future.

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I. INTRODUCTION

The article seeks to address a thought-provoking question: Could the recent and pivotal Italian civil justice reform bear any resemblance to the American civil proceeding framework, both in technical aspects and from a broader perspective? The answer reveals interesting results also on the methods of comparing legal systems, with a particular emphasis on procedural considerations and policy issues.

On May 5, 2021, the Italian Government drafted the NRRP (National Recovery and Resilience Plan), a plan requested by the E.U., to provide

Eu countries with funds for responding to the pandemic crisis.[1] The Italian NRRP acknowledges civil justice reform as one of the main strategic tools. The inclusion of civil justice reform in the NRRP purposes is justified by the inefficiency of the justice system, whose lengthy proceedings hurt the business setting.[2] The Italian civil justice inefficiency in terms of time to issue a final decision is not a recent or new concern. For this purpose, since the last decade of the past century, the Italian lawmaker has issued several reforms, mainly by amending the Code of Civil Procedure as it was framed in 1942.[3] This long-reforming affected many rules of the Code of Civil Procedure, for instance, the introduction of a strict preclusion system for parties' activities and some restrictions in the judicial review path. However, it never addressed, at least concerning the reforms after that provided in 1990, the comprehensive structure of civil proceedings in such a strictly revolutionary way. Indeed, the 1942 Italian Code of Civil Procedure, even amended many times, has always conformed to the traditional (and

[1] On 5 May 5 2021, Italy presented the National Recovery and Resilience Plan (NRRP) is part of the Next Generation EU (NGEU) program, namely the € 750 billion package that the European Union negotiated in response to the pandemic crisis. The main component of the NGEU program is the Recovery and Resilience Facility (RRF), which has a duration of six years – from 2021 to 2026 – and a total size of € 672.5 billion interest loans. The NRRP, envisages investments and a consistent reform package. The NRRP is available at official website "Italia Domani" created by the Italian government to provide news on its implementation of the available here https://www.italiadomani.gov.it/content/sogei-ng/it/en/home.html; (hereinafter, the "Official NRRP"); *see also* the summary, in English, of NRRP, available on the Italian Ministry of Economy and Finance official website at https://www.mef.gov.it/en/focus/The-National-Recovery-and-Resilience-Plan-NRRP/ .

[2] The data published in the 2023 EU Justice Scoreboard by the European Commission demonstrates that Italy has consistently ranked among the EU countries with the longest estimated time needed to resolve civil, commercial, administrative, and other cases from 2012 to 2021. The report is available here https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en

[3] The main reform on Italian civil procedure is dated 1990, but many others have followed until now, all devoted to the same purpose: reducing the length of the civil proceedings, either at the first instance or specifically regarding the access to the Court of Appeal and the Italian Supreme Court. The more significant are dated 2005 and 2012, but they have eloquently demonstrated that the matter has not been solved. See, on the matter, Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 AM. J. COMP. L. 657 (1997); see also Remo Caponi, *The Performance of the Italian Justice System: An Empirical Assessment*, 2 ITALIAN L.J. 15, 22, 28 (2016).

Continental) framework due to a judge-centered system that governs the parties' activities since the preliminary hearing (after the introductory pleadings of the lawsuit), in so conferring the judge a very active role.[4] Nonetheless, the reality soon changed for several reasons. On the one hand, the growing number of civil disputes, often complex and multiparty, the economic evolution, and the continuous increase of new litigation matters resulted in the explosion of the number of claims brought before the courts.[5] On the other hand, the safeguarding of the judiciary structure, especially in terms of the low judges' number and the lack of successful reinforcement of alternative dispute resolution tools, unavoidably carried out the progressive increase of inefficient results and the substantial decrease of the quality of the decisions.[6] Whereas the main reason for the last reform remains – as the previous reforms – the decreasing of the inefficiency of the judiciary system, the purpose is now formally qualified precisely: the willingness to reduce the duration time for the *forty percent by five years*.[7] With the Law passed on November 25, 2021, number 206,[8] and the relevant implementing decrees, i.e.,

[4] The Italian system belongs to the group of civil procedure systems defined as inquisitorial or non-adversarial. Amongst the featured characteristic of these systems there is an activist judge who conduct the proceedings and intervene to ensure a solution based on the merits of the case. On the contrary, the opposite attitude belongs to adversarial systems characterized by party-controlled procedures, and a neutral judge concerned predominantly with the integrity of the process. See, in this sense, Franklin Strier, *What Can the American Adversary System Learn from an Inquisitional System of Justice*, 76 JUDICATURE 109 (1992). Even if we consider that this classical distinction between the adversarial and inquisitorial model in structuring the civil process between Anglo-American area and Continental ones should be revised and revealed some inconsistency in practice until the 2022 Reform, the Italian system was marked a judge that comes into the process since the beginning of the lawsuit, following the introductory pleadings, in a phase where the boundaries of the controversy was not entirely defined and thus their definition was subjected to the judge's control. See, on the matter, Cesare Cavallini & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, 34 FLA. J. INT'L L. (2023) (forthcoming)

[5] Cesare Cavallini & Stefania Cirillo, *The Judge Posner Doctrine as a Method to Reform the Italian Civil Justice System*, 2 CTS. & JUST. L.J. 8, 41 (2020).

[6] *Id.* 42, 43.

[7] *See* Official NRRP, *supra* note 1, at 95.

[8] This Law is an enabling act (Legge Delega). This legislative tool consists in the Parliament's delegation of the exercise of the legislative function to the Government by fixing specific and clear principles and criteria to which the Government must adhere. Then the Government exercises the legislative function by the so-called

Legislative Decrees No. 149/2022, 150/2022, and 151/2022[9] (hereinafter, the "Reform"), the Italian Government dealt with the mentioned daunting task by several and varying measures.

Generally speaking, a virtuous civil justice reform should include measures on many aspects, starting with judiciary reorganization and implementation and renewed access to legal careers, especially for lawyers.[10] Moreover, it should include a reform of the civil proceeding able to deliver a new role of the lawyers and the judge during the trial. Only in such a way should it claim to influence both the length of the dispute and the quality of decisions (in other terms, to impact both the efficiency and the efficacy of civil proceedings).[11]

The great virtue of the Reform is that it has defined measures for affecting both aspects, i.e., the structure of the judiciary system and the structure of the civil proceedings. However, our attention focuses on the structural amendments to the civil proceeding pattern and, in particular, on the rules (i) supporting and favoring the A.D.R. methods; (ii)

Legislative Decree/s. Law passed on November 25, 2021, number 206 is available here https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021;206

[9] The Legislative Decree No. 149/2022 concerned the implementation of various regulations related to civil proceedings efficiency, alternative dispute resolution instruments revision, and streamlining of proceedings in personal and family rights and in enforcement. Legislative Decree No. 150/2022 focused on implementing rules to enhance the efficiency of the criminal process, introduce restorative justice measures, and establish provisions for expediting judicial proceedings. Furthermore, Legislative Decree No. 151/2022 addressed the implementation of rules regarding structural changes, specifically the establishment of the Office of the Trial (Ufficio del Processo). This office aims to enhance the justice system through improvements and technological innovations. It comprises additional administrative staff members from diverse backgrounds and provides information tools to assist judges in various tasks. These three Legislative Decrees are available here https://www.gazzettaufficiale.it/showNewsDetail?id=5437&backTo=archivio&anno=2022&provenienza=archivio. This rules are now embodied in the Italian Code of Civil Procedure, and in the Law governed the Mediation and Negotiation.

[10] Cesare Cavallini & Stefania Cirillo, *supra* note 5, at 43-4 noting that "a possible reform of the civil justice will be identified in the rules that regulate the framework of the civil judiciary system. More specifically, the rules that regulate the job and the career of lawyers and judges, as well as the incentives to settle for litigants (affecting their stakes in disputes rather than forcing them to settle)".

[11] It is worth mentioning that also the Economics scholars are used to approach the issue on efficacy and efficiency of the civil justice in these terms, as it showed by the paper delivered by OECD *What makes civil justice effective*, OECD ECONOMICS DEPARTMENT POLICY NOTES (2013), https://www.oecd.org/economy/growth/Civil%20Justice%20Policy%20Note.pdf.

conferring a new role to the lawyers on the determination of facts and evidence by a new institution, now at the core of the Negotiation, (the out-of-court discovery); (iii) lending a new role of the first hearing; (iv) incentivizing the settlement in the course of the dispute (the so-called judicially-led settlement); (v) introducing the new summary orders. Following the amendments regarding these aspects, the Italian proceeding might apparently resemble the U.S. system, allowing us to make a new step in the long-debated dichotomy between the adversary proceeding, mainly ascribed to common law systems, and the inquisitorial proceeding, mainly ascribed to civil law systems.[12]

"Americanization of the Reform" does not refer to a mere technical comparison. It tries to stimulate an analysis based on the search for shared values and cornerstones and to understand if, for pursuing them, a legal transplant might be valuable or not. While the focus of our discussion turns around on how the Reform have incorporated significant elements of the U.S. civil process, the transplant will also be analyzed in the other direction, and consequently by dealing with the possibility that the U.S. might borrow some practices from how Italy adapted the US-belonged institutions to its system. Furthermore, this examination extends beyond an awareness of the Reform's features that resemble the U.S. process. It also encompasses an analysis of the growing criticism within the American legal system, which may impact the reformed Italian system. This cross-comparison enables fascinating evaluations and sheds light on a new avenue for comparative studies in international civil justice and procedure. Accordingly, Chapter I provides an overview of the key provisions of the Reform. Chapter II deals with a comparison of these new Italian aspects with the cornerstones and tools of the U.S. civil procedure, as governed at the Federal level. Here, the concept of Americanization will fully materialize, encompassing all its intricate

[12] For the distinction between the dichotomy *see*, generally and amongst other, Franklin Strier, supra note 4, at 109; *see also* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823-4 (1985), MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 3-6 (1986) (hereinafter "THE FACES OF JUSTICE"); MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT, 2-4 (1997) (hereinafter, "EVIDENCE LAW ADRIFT"); Michele Taruffo, *Aspetti fondamentali del processo civile di common law e di civil law*, 36 REVISTA DA FACULDADE DE DIREITO DA UFPR 32 (2001); see also OSCAR G. CHASE, HELEN HERSHKOFF, LINDA J. SILBERMAN, JOHN SORABJI, ROLF STÜRNER, YASUHEI TANIGUCHI, VICENZO VARANO, CIVIL LITIGATION IN COMPARATIVE CONTEXT, (WEST ACADEMIC) 5 (2017).

nuances. Chapter III presents a broader assessment of the Americanization of the Reform, examining its impact on both systems in terms of methodology and outcomes.

II. THE 2022 ITALIAN CIVIL JUSTICE REFORM: THE ESSENTIALS

This chapter briefly provides an overview of the main aspects of the Reform, as they represent the pattern on which we might carry out the answer to its Americanization.

A. The impact on the Mediation and the Negotiation

The Reform significantly affects the relationship between the ordinary adjudication and the alternative and complementary dispute resolution methods through essential innovations in the discipline of the A.D.R., mainly by enhancing and strengthening, through multiple and significant provisions, the "Mediation" and the "Negotiation." [13]

These innovations intend to strengthen the use and the effectiveness of complementary forms of A.D.R., aiming to provide a direct and immediate benefit to citizens by weakening the courts' backlog.[14]

Amongst the innovations on the matter, the Reform highly expanded the types of litigation requiring for its admissibility the

[13]The Italian law regulates, respectively, the Mediation with the Italian Legislative Decree No 28/2010, so called the Italian Mediation Law on Civil and Commercial Dispute (a translation of this law, in the version before the 2022 reform, is available here: https://www.mondoadr.it/wp-content/uploads/The-Italian-Mediation-Law.pdf); (hereinafter, the "Italian Legislative Decree on Mediation") and the Negotiation with the Decree Law n. 132/2014 (converted in the Law No. 162/2014), so called the Italian Law on Assisted Negotiation (hereinafter "the Italian Law on Assisted Negotiation").

[14] *See* the Minister of Justice Marta Cartabia hearing on the Recovery Plan at the Chamber of Deputies held on 15 March 2021 available here https://webtv.camera.it/evento/17725; the text is available here https://dpei.it/wp-content/uploads/2021/03/CARTABIA-LINEE-PROGRAMMATICHE-SULLA-GIUSTIZIA-15-MARZO-2021.pdf, p. 7 (hereinafter "The Reform of Justice Guidelines"). This concept is inspired on the idea of ADR created by Mauro Cappelletti. See Mauro Cappelletti*, Giudici laici. Alcune ragioni attuali per una loro maggiore utilizzazione in Italia*, RIVISTA DI DIRITTO PROCESSUALE, 707 (1979); ID., *Appunti su conciliatore e conciliazione*, Rivista trimestrale di diritto e procedura civile 57 (1981).

conciliation attempt through the mediation procedure.[15] In this sense, it reinforced the three mediation forms serving as prerequisites for initiating court proceedings: compulsory mediation, court-ordered mediation, and voluntary or conventional mediation. If the parties do not implement this attempt to conciliate, the proceeding is inadmissible.

Specifically, regarding compulsory mediation, the Reform has expanded the range of lawsuits in which parties are required to perform a mediation procedure before commencing them, that now include the lawsuits concerning certain period contracts.[16] In this case, the lawmaker, based on a general evaluation of the characteristics of a specific type of dispute rather than the specific dispute at hand, has made the beginning of ordinary proceedings conditional upon a procedure of mediation, irrespective of the relevant outcome.

Regarding court-ordered mediation, the Reform states that judges can order mediation without any limitations (as it was before) but in any circumstance, including during Court of Appeal proceedings[17]. In this scenario, the judge assesses the merits of an existing and ongoing dispute to determine the appropriateness of mediation. As part of the intersection of mediation with court, consider that for court-ordered mediation, the Reform strengthened mechanisms for tracking the cases that are that are more amenable to mediation.[18] Additionally, it prescribes the possibility to provide training in alternative dispute resolution (ADR) to judges in collaboration with universities.[19] Moreover, a reward system has been

[15] The compulsory mediation exists in Italy also before the Reform. For more insights on it see Giuseppe De Palo & Romina Canessa, *Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713 (2014).

[16] The new Section 5 of the Italian Legislative Decree on Mediation, *supra* note 13. Before the Reform the compulsory mediation was provided for those disputes concerning a matter of joint ownership, real estate, partition, inheritances, family covenants, lease, bailment, business lease, damages for medical malpractice or defamation via the press or any other means of publicity, insurance, bank and financial contracts. The extension to the period contracts was justified by the possibility to incentivize for the long relationships ending-types of dispute aimed at the conciliation.

[17] The new Section 5-*quater* of the Italian Legislative Decree on Mediation, *supra* note 13.

[18] The new Section 5-quinquies, paragraph 3 of the Italian Legislative Decree on Mediation, *supra* note 13.

[19] The new Section 5-quinquies, paragraph 1 of the Italian Legislative Decree on Mediation, *supra* note 13.

introduced, by connecting the career evaluation of magistrates to the number of mediations they have ordered.[20]

With reference to the voluntary or conventional mediation, where the parties provide the mediation as precondition to start a lawsuit, the Reform extended this possibility for contracts or bylaws of public entities.[21] This expansion eliminates the concern that opting for a mediation procedure may expose public officials to fiscal liability for potential financial losses.

Another aspect of the Reform dealing in terms of relation between mediation and trial pertains to the strengthening - as a deterrent to ordinary court proceedings - of economic sanctions for parties in the event that mediation fails;[22] as well as the procedural consequences of the parties' behaviors in mediation.[23] Similarly, the new provision on the so-called technical expertise in mediation: when appointing the expert, the parties may now agree on the possibility to file the expert's report in the subsequent proceedings,[24] as an exception to the duty of confidentiality of the mediation.

One of the most remarkable innovations set by the Reform is also the possibility granted to lawyers to hear witnesses or the parties on specific facts relevant to the claim during the Negotiation procedure: the so called «istruttoria stragiudiziale» (out-of-court discovery). [25] According to this new rule, the questions posed by the lawyers to witnesses or the parties, along with the relevant answers and statements, shall be recorded in a document drawn up by the lawyers. If the Negotiation fails and, consequently, the parties will bring the dispute before the court, the Reform provides also that the information gathered in this way may be used during a future trial dealing with the same facts.

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[20] The new Section 5-quinquies, paragraph 2 of the Italian Legislative Decree on Mediation, *supra* note 13..

[21] The new Section 5-sexies of the Italian Legislative Decree on Mediation, *supra* note 13.

[22] The new Section 12 *bis*, paragraphs 2 and 3 and Section 13 of the Italian Legislative Decree on Mediation, *supra* note 13.

[23] The new Section 12 *bis*, paragraph 1 of the Italian Legislative Decree on Mediation, *supra* note 13.

[24] The new Section 8, paragraph 7 of the Italian Legislative Decree on Mediation, *supra* note 13.

[25] The new Section 4 *bis* and Section 4 *ter* of the Italian Law on Assisted Negotiation, *supra* note 13.

The Reform has also simplified these A.D.R. procedures[26], for instance, by providing a way to conduct them electronically. The electronic procedure should make them more accessible, thus further incentivizing their use.

B. The new first hearing.

The Reform confers a new role to the first hearing that led to a scheme of civil proceedings entirely new and away from the traditional Continental framework. More specifically, the Italian proceeding is not structured into a pretrial and trial phase. Parties may present the facts and the evidence from the beginning of the proceeding within certain time limits set forth by the Code of Civil Procedure that expire during the proceeding. Before the Reform, following the introductory pleadings, the parties, at the first hearing, might ask (and the judge allowed almost automatically them) to submit three pleadings (according to the old version of the Section183, sixth paragraph, no. 1, 2, and 3 of the Code of Civil Procedure).[27] With the first pleadings (to be submitted within 30 days of the judge's order to file these three pleadings), the parties might specify or modify their claims and defenses. With the second pleading (to be submitted within 30 days from the first pleading's expiration day), they might answer the first pleadings submitted by the other parties and add additional evidence requests. This pleading, indeed, represented the last time limit for evidence requests. With the third pleading (to be submitted within 20 days from the second pleading's expiration day), they might request counter-evidence (*i.e.*, evidence to challenge the evidence alleged by the other party with pleading no. 2). Following this path, the boundaries of the controversy (facts, documentary evidence, and requests for non-documentary evidence) were defined. The practice showed how this structure made the first hearing truly vacuous. Lawyers formally appeared at the first hearing just to request the judges' order for granting the time limits for filing the mentioned three pleadings and did

[26] The new Section 4, paragraphs 3 the Italian Legislative Decree on Mediation, *supra* note 13 and Section 2, paragraph 2, lett. c. of the Italian Law on Assisted Negotiation, *supra* note 13.

[27] See the old Section 183 of the Italian civil procedure code [For a translated version of the Italian Code of Civil Procedure before the Reform *see* SIMONA GROSSI & CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE, 203 (2010)].

not discuss the claim. [28] On this line, the trial became severely documentary, and the role of the "day-in-court"[29] vanished.

In this respect, the 2022 Reform moves toward a new preeminence of the first hearing as the primary tool for the discussion of the litigation, as the actual moment in which the judge formally comes to the scene, and as a tool to quickly address the dispute toward various types of ending solutions, only one of which is the traditional adjudication.[30] The first hearing may now play this new role since the boundaries of the facts and evidence are fixed before this hearing. In other words, the *thema decidendum et probandum* must be already established at the first hearing. For this reason, the Reform also provided that the plaintiff's complaint must contain clearly and specifically[31] the subject of the claim, the description of the factual and legal grounds of the claim and the relative conclusions, the non-documentary evidence requests, and the filing of the documental evidence. Then, the defendant's complaint requires a clear and specific statement[32] of the defendant's answers to each claim asserted, along with the non-documentary evidence requests and the filing of the documental evidence. Then – and this is the most remarkable innovation - the parties must file three pleadings before (and not after) the first hearing.[33] After filing these pleadings, the first hearing occurs, and the judge enters the trial scene, having acknowledged the boundaries of the lawsuit entirely. At this hearing the judge has several options, which are justified by a thorough acknowledgment of the claim. One option is to schedule hearing(s) to question the witness and the parties, following the examination of admissibility and relevance of the parties' oral evidence requests.[34] Another option is to encourage a

[28] See Cesare Cavallini, *Verso il nuovo modello del procedimento ordinario di cognizione*, 1 Rivista di diritto processuale 161 (2022).

[29] MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE, *supra* note 12, at 51 (The Author uses this expression to indicate the trial model where all material bearing on the case is preferably considered in a single block of time. While, the opposite variant, commonly ascribed to Continental systems, provides for proceedings developing through separate sessions at which material is gradually assembled in a piecemeal, or in installment style).

[30] See the Section 171-bis and Section 171-ter of the Italian Code of Civil Procedure.

[31] See the new Section 163 of the Italian Code of Civil Procedure.

[32] See the new Section 167 of the Italian Code of Civil Procedure.

[33] See the new Section 171 *ter* of the Italian Code of Civil Procedure.

[34] See the new Section 183, fourth paragraph of the Italian Code of Civil Procedure.

judicial settlement between the parties.[35] Alternatively, the judge may opt for summary adjudication[36] or, if the case is ready for a decision, initiate the ordinary adjudication phase, which involves a final exchange of briefs between the parties.[37]

C. The judicially-led settlement.

The Reform severely encouraged in-court settlement.[38] Section 185 of the Italian civil procedure code (titled "the conciliation attempt") provides that the judge, upon the request made by the parties, is to schedule a hearing to discuss with them the possibility of conciliation.[39] Moreover, under article 185 bis of the Italian civil procedure code (titled "judge's conciliation proposal"), the judge, during the first hearing or until the taking of evidence ends, may outline a settlement proposal and invite the parties to consider it, by having regard to the nature and the value of the dispute, and only if the subject of the lawsuit must allow easy and prompt legal solutions.[40] The Reform enhanced the in-court settlement in two aspects. Firstly, it provides that the parties must personally participate in the first hearing to allow the judge to try the conciliation.[41] The judge may infer circumstantial evidence from the party's nonappearance.[42] With this amendment, the Italian legislator made the judge's conciliation attempt compulsory. [43] Secondly, it allows

[35] See Section II.C. of this Article.

[36] See Section II.D. of this Article.

[37] See the new Section 183, second paragraph and Section 187 of the Italian Code of Civil Procedure.

[38] For the sake of clarity, with in-court settlement we refer to the agreement that the parties set out during the civil process in the presence of a judge, and which is apt to resolve, totally or partially, the dispute. For an in-depth analysis on the matter see Cesare Cavallini & Stefania Cirillo, *In Praise of Reconciliation: The In-Court Settlement as a Global Outreach for Appropriate Dispute Resolution*, JOURNAL OF DISPUTE RESOLUTION, (forthcoming 2023).

[39] Section 185 of the Italian Code of Civil Procedure.

[40] Section 185 *bis* of the Italian Code of Civil Procedure. For some reflections on this rule *see* Alberto Tedoldi, *Iudex Statutor Et Iudex Mediator: Proposta Conciliativa Ex Art. 185 Bis C.P.C., Precognizione E Ricusazione Del Giudice*, 4-5 RIVISTA DI DIRITTO PROCESSUALE 983 (2015).

[41] Section 185 *bis* of the Italian Code of Civil Procedure.

[42] *Id.*

[43] CESARE CAVALLINI, LEZIONI DI DIRITTO PROCESSUALE CIVILE, 503 (2022). Please note that the compulsory conciliation attempt had a troubled path, *id.* Law

the judge to make this proposal until the final phase of the litigation, i.e., when she refers the case to the panel of judges for the decision (and not only at the first hearing).[44]

D. The new summary adjudication.

The Reform introduced two forms of summary adjudication, allowing for early trial termination.[45] The judge can pursue these adjudication forms if specific requirements are met. These specific ending types of the lawsuit – which can be submitted by each party by a particular motion, are governed as an interim measure proceeding. Despite a complete evaluation by the judge on the merits, they are not formally considered a final adjudication.

The first type of summary adjudication allows the judge to uphold the plaintiff's claim when the alleged facts are unquestionable in his favor and the defendant's objections appear unfounded. It is immediately enforceable and may be issued at the plaintiff's request throughout the proceeding.[46]

The second type of summary adjudication provides that the judge, at the end of the first hearing, if requested by the defendant, may stand for rejecting the claim in two cases: if the plaintiff's claim has no real prospect of victory, due to the unquestionable facts and documentary

number 353 of November 26, 1990, made compulsory a conciliation attempt by the judge and, to this purpose, imposed the personal appearance of the parties at the first hearing, *id.* With Law no. 80 of May 14, 2005, the compulsory conciliation attempt at the first hearing was repealed because it was been considered unsuccessful, *id.* However, in order to enhance the ADR mechanism, the Reform reintroduced it, *id.* For other reflections on the compulsory conciliation attempt *see* Paolo Biavati, *Conciliazione strutturata e politiche della giustizia*, 3 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 785 (2005).

[44] For an in-depth analysis of these two aspects of the Reform see Antonio Carratta & Cesare Cavallini, *Judicial settlement e modelli di tutela a confronto*, 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 427 (2022), Silvana Dalla Bontà, *Fra mediazione e decisione. La riforma apre ad un nuovo paradigma di giudice?*, 1 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE, 21, 23, (2023), Sergio Menchini & Elena Merlin, *Le Nuove Norme Sul Processo Ordinario Di Primo Grado Davanti Al Tribunale*, 2 RIVISTA DI DIRITTO PROCESSUALE 578, 603 (2023).

[45] Section 183 *ter* and Section 183 *quarter* of the Italian Code of Civil Procedure.

[46] Section 183 *ter* of the Italian Code of Civil Procedure.

allegations in favor of the defendant, or if the relevant pleading is null and void.[47]

The scope of these orders is to allow litigants to avoid the expense and delay accompanying protracted trials on factual non-controversial matters.[48] Moreover, these ending-types does not represent *res iudicata* and, consequently, the same claim might be relitigated between the same parties.

III. WHAT ABOUT AMERICANIZATION?

One might perceive "Americanization" as a mere technical process whereby the U.S. system influences another system, in this case, the Italian one, leading to its adaptation. However, this is not the planned meaning of "Americanization." Instead, it serves as a provocative concept and a basis for reflection. This reflection arises from recognizing certain similarities between the two systems. These similarities indicate a shared value framework and suggest the existence of common foundational principles, despite each system having its unique characteristics. Elements such as orality, immediacy, concentration, and the independence of judges are inherent to both systems.

Moreover, "Americanization" prompts an insightful discussion. The primary aim of this reflection is to serve as a "warning". For instance, when examining mediation, we will observe how a shared set of legislative aims takes different paths in implementation. While regarding the role of the first hearing, the evolving managerial role of judges, and the method of defining claim boundaries, demonstrate strict similarities that lead us to establish a third system known as "semi-adversarial" within the adversary/non-adversary dichotomy. In the context of settlements, the Americanization of the Italian system provides an opportunity to introduce pre-existing mechanisms in the Italian system that can counteract potential negative consequences of the coerced settlement observed in the United States. Furthermore, discussing "Americanization" implies that the Reform should be cautious and avoid replicating the pitfalls encountered by similar institutions within the American system, such as those related to summary judgment. This

[47] Section 183 *quarter* of the Italian Code of Civil Procedure.

[48] Davide Turroni, *La definizione anticipata del giudizio – Artt. 183-ter e 183-quater c.p.c.*, GIURISPRUDENZA ITALIANA 454 (Febbraio 2023)

requires a more in-depth analysis of the drawbacks associated with such institutions.

A. The New Italian Regime of Mediation and Negotiation: Rebounding The "Sleeping Beauties".

The Reform introduced significant amendments to the laws governing mediation and negotiation, strengthening them in various aspects as described in Section II.A. These amendments align with the overall direction of the Reform, which aims to determine the functions that are not specifically assigned to the judiciary by the Italian Constitution and delegate them to other entities whenever feasible.[49] This approach is based on the idea that only the exercise of the judicial function, *id est* determining the existence or absence of a right (i.e., the declarative justice), is exclusively reserved for judges[50] pursuant to the Article 102 of the Italian Constitution.[51] Moreover, this approach, while still

[49] On the matter the Report on the reform (i.e. Government Act submitted for parliamentary opinion No. 407 18th Legislature available here https://www.senato.it/leg/18/BGT/Schede/docnonleg/45207.htm) (hereinafter, the "Reform Report"), at 6 explains that «first and foremost, the reform focuses on the relationship between ordinary jurisdiction and alternative and complementary forms of justice. It introduces significant innovations in the regulation of Alternative Dispute Resolution (ADR) methods, aiming to enhance and strengthen the institutes of mediation and assisted negotiation through multiple provisions. Additionally, it includes a revision of the codified discipline of arbitration, ensuring its effectiveness and alignment with the new legal framework».

[50] *See* VIRGILIO ANDRIOLI, STUDI SULLA GIUSTIZIA COSTITUZIONALE, 502 (1992), who stressed this principle in light of the principle of indipendence of the judges; Giuliano Scarselli, *Note sulla c.d. degiurisdizionalizzazione*, QUESTIONE GIUSTIZIA, 10.09.2015, here https://www.questionegiustizia.it/articolo/note-sulla-c_d_degiurisdizionalizzazione_10-09-2015.php; Francesco Paolo Luiso, *Giustizia Alternativa O Alternativa Alla Giustizia*, in *www.judicium.it* (2010) here https://www.digies.unirc.it/documentazione/materiale_didattico/697_2014_1373_21057.pdf. The Author explains how the ADRs represents more than methods of alternative justice, alternative methods to get justice. Moreover, Italian literature discussed if certain forms of compulsory ADR, like the compulsory mediation in Italy, are consistent with the Italian Constitution and for a general discussion on the matter see Andrea Simoncini & Elia Cremona, *Mediazione e Costituzione*, 1 GIUSTIZIA CONSENSUALE 3 (2022).

[51] COSTITUZIONE [COST.] (It.), https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf Section 102, paragraph 1 of the Italian Constitution provides that «Judicial

emphasizing the role of judges in delivering declarative justice, rejects the notion that conciliation fails to offer a form of justice to the litigants.[52] The Italian Constitution seems to support this approach if one notes how the notions of justice and jurisdiction are not considered synonymous. The Constitution does not view justice as an automatic and inherent extension of jurisdiction[53]. This is evident in Section 111, paragraph 2 of the Italian Constitution, which addresses "due process" and thus shows how the two concepts, that are legal process ("trial") and the attainment of justice ("due" or "fair" outcomes), are distinct and should not be

proceedings are exercised by ordinary magistrates empowered and regulated by the provisions concerning the Judiciary».

[52] On the contrary, many authors considered the tension towards justice as the discriminating factor between conciliation and adjudication. To clarify, they believed that justice could only be achieved through adjudication, which refers to a formal legal decision. In their perspective, settling a dispute is merely focused on resolving the conflicting interests of the parties, without necessarily leading to a fair outcome. *See*, in these terms, Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (stating that "adjudication uses public resources and employs not strangers chosen by the parties, but public officials chosen by a process in which the public participates. These officials, like members of the legislative and executive branches, possess a power that has been defined and conferred by public law, not by private agreement. Their job is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them. This duty is not discharged when the parties settle."); Judith Resnik, *Symposium on Litigation Management: Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 552 (1986) (stating that "consent" to judgment may not, in and of itself, be a sufficient guarantee of quality, fairness, or litigant satisfaction); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 108 (1986) (stating that "[a]nother way to put the matter is to note that in a world with zero litigation costs, we would want the validity of all complaints to be adjudicated. This is so because what we would really like to see is the payment of full compensation to persons whose allegations are valid and the payment of no compensation to those whose charges are false. Equally, we would like to see all and only defendants who commit wrongs brought to justice. In a world where lawsuits could be maintained without expense, we would come as close as possible to achieving these goals by trying every complaint. However, since we live in a world where costs cannot be ignored, and where litigation severely strains relationships, we tolerate a state of affairs in which most plaintiffs get more or less than they deserve, and most defendants pay more or less than they ought. In other words, we sacrifice justice for the sake of efficiency and peace").

[53] *See* Andrea Simoncini & Elia Cremona, *supra note* 50*,* at 3 (arguing that by promoting the cohesion of the society, mediation represents a tool apt to fulfil the social solidarity obligations as delineated by the Italian Constitution).

melded.[54] Furthermore, there are other indications within the Italian Constitution in this sense when it promotes social cohesion. Section 2 emphasizes the citizens' obligation to fulfill not only economic and political duties but also obligations of "social solidarity."[55] This signifies that the Constitutional lawmaker perceives individuals not merely as bearers of "justiciable rights" (and consequently the right to seek judicial intervention through the courts) but also as individuals with a responsibility for social solidarity aimed at resolving conflicts. Thus, the Reform moves forward a framework of civil process where the conciliation and adjudication are not two heterogeneous phenomena and they are directed to the same purpose, that is to grant justice. The inclination to heavily rely on ADRs was also driven by the undervaluation of mediation and negotiation in practical implementation. While we cannot claim that they were entirely neglected, it is evident that since their introduction, one would have anticipated a more substantial uptake in practice,[56] particularly in respect of their role of discouraging civil litigation.[57]

To this effect, in order to rebounding ADR, one can notice how the new rules on mediation and negotiation strongly reinforce the connection between ordinary jurisdiction and the Mediation/Negotiation, to the extent that according to the guidelines for justice provided by the Minister of Justice during the hearing on the Recovery Plan at the Chamber of Deputies, Alternative Dispute Resolution (ADR) should be regarded as a «complementary» aspect of the justice system rather than a complete «alternative».[58] Moreover, this clarification does not refer only to the positive effect the ADR has on the judicial backlog but especially on the social relationships at stake, aiming to repair conflicts and reduce

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[54] *See* COSTITUZIONE [COST.] (It.) § 111.

[55] *See id.* § 2.

[56] For the data on Mediation and Negotiation in Italy *see* Studi, analisi e ricerche della DG-Stat ("Studies, analyses, and investigations of DG-Stat"), Italian Ministry Of Justice, available at https://webstat.giustizia.it/SitePages/StatisticheGiudiziarie/civile/Mediazione%20Civile.aspx; *See also* the data collected by the Permanent Observatory on the Exercise of Jurisdiction, a body of the National Forensic Council available at https://www.consiglionazionaleforense.it/documents/20182/431673/Monitoraggio+negoziazione+assititita+2017.pdf/d486fa06-c595-4a05-a19d-fa1873d01cc0?t=1522824304000

[57] See the 2023 EU Justice Scoreboard, supra note 2.

[58] *See* The Reform of Justice Guidelines, *supra* note 14, at 7.

social tensions.[59]As we underline under Section II.A, the Reform reinforces in this sense the three mediation forms serving as prerequisites for initiating court proceedings: compulsory mediation, court-ordered mediation, and voluntary or conventional mediation.[60] The pinnacle of the complementary relationship between the two processes is achieved through the introduction of the new concept of out-of-court discovery for negotiation.[61] This institute bears a striking resemblance to the pretrial discovery commonly seen in the United States. Notably, the significant aspect is that the oral evidence collected during the negotiation can be integrated into the regular trial process. On one hand, this enhances the negotiation itself by granting lawyers a role akin to that of judges in our system, including the ability to question witnesses.[62] On the other hand, it establishes a direct connection between the negotiation phase and the subsequent trial proceedings.

Mediation and negotiation have grown also in the legal system of the United States.[63] In particular, the proposal set forth by Professor Frank Sander during the Pound Conference in 1976[64] marked the origin of the

[59] *Id.* at 8.

[60] See Section II.A of this Article and relevant notes.

[61] The new Section 4 *bis* and Section 4 *ter* of the Italian Law on Assisted Negotiation.

[62] See deeply on the matter Section II.B1 of this Article.

[63]See Nancy Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution,* 88 FORDHAM LAW REVIEW 2449 (2020).The Author, based on the significant role of the ADR and their impact on the access to justice in the federal judicial system and in U.S. state court systems, reported that there is no official data regarding the number of cases that are referred to mediation and other ADR processes, the dispositions that result, or parties' perceptions of the process and advocate for institutionalization of data collection on the matter; unless for some federal district courts like the Northern and Central Districts of California and Florida. Moreover, the Article describes the current state of the institutionalization of ADR in the federal district courts and in select states' trial courts and try to infer data from several sources, like metrics permitting comparisons among nations of the quality of their governance and their commitment to the rule of law. The Author also referred to some data collected on statutes, rules, and other information regarding dispute resolution for each state by The Resolution Systems Institute (RSI), a non-profit organization in the United States, has developed a searchable online database called "Court ADR Across the U.S." Court ADR Across the U.S., RESOL. SYSTEMS INST., https://www.aboutrsi.org/acrossus [https://perma.cc/ H5A8-X3H5] that proves how New York, California, Texas, Maryland court systems are recognized leaders in the dispute resolution field.

[64] For a review of the Pound Conference, see A. LEO LEVIN & RUSSELL R. WHEELER, THE POUND CONFERENCE: PERSPECTIVE ON JUSTICE IN THE FUTURE:

"Modern Mediation Movement".[65] This proposal introduced the concept of a "multi-door" courthouse, which referred to the necessity of creating a system of various alternative dispute resolution avenues in addition to the traditional courthouse.[66] Mediation was considered an initial step alongside other available options. In the view of this movement, the different multi-doors were designed as separate and distinct resolution procedures, existing outside the formal courthouse, thereby establishing a truly private system of dispute resolution or justice. Much of the enthusiasm about mediation was connected to the belief that it was a truly "alternative" process and something different from court.[67] The values of mediation and other forms of dispute resolutions lied in some values that are different from those of the adversarial, win-lose processes of litigation. Amongst these values, there are the possibility for individuals to resolve matters and maintain relationships in the process[68], the opportunity for creative and innovative solutions to problems, focused on party participation and satisfaction[69], the confidentiality of the procedure[70], the self-determination[71]. However, these visions and objectives were soon replaced by the attitude to consider the dispute

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PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 289, 291 (A. Leo Levin & Russell R. Wheeler Eds., 1979).

[65] For the history of the "Modern Mediation Movement" see Patrick Fn'Piere & Linda Work, *On the Growth and Development of Dispute Resolution*, 81 KY. L. J. 959 (1992-1993); KIMBERLEE K. KOVACII, MEDIATION: PRINCIPLES AND PRACTICE 30-32 (3D ED. 2004); See Linda R. Singer, *The Quiet Revolution in Dispute Settlement*, 7 MEDIATION Q. 105 (1989); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 171–81 (2003); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR*," 19 FLA. ST. U. L. REV. 1, 6–8 (1999).

[66]Frank E. A. Sander, *Varieties of Dispute Processing*, IN A. LEO LEVIN & RUSSELL R. WHEELER, *supra* note 64, at 65.

[67] Timothy Hedeen, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONF. RESOL. Q. 101 (2004).

[68] See, on the matter, Kimberlee K. Kovach*, The Mediation Coma: Purposeful or Problematic*, 16 CARDOZO J. CONFLICT RESOL. 755, 762 (2014).

[69] *Id.* at 762

[70] Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?* 85 MARQ. L. REV. 79 (2001).

[71] Robert A. Baruch Bush & Joseph P. Folger, *Reclaiming Mediation's Future: Re-Focusing on Party Self-Determination*, 16 CARDOZO J. CONFLICT RESOL. 741, 742 (2014) (stating that "self-determination or what we call empowerment, is the central and supreme value of mediation").

resolution processes within the courthouse, or in the context of litigation, and thus ADR procedures loses their main character of alternatives to the ordinary procedure.[72] The symbol of this path was when courts were given the authority to order cases to mediation.[73] The marriage of ADR, specifically mediation, with the court system has compromised the foundational values upon which ADR was established.[74] Conciliation, informality, self-determination, creativity, and confidentiality faded away and vanished. In a system where the ordinary procedure heavily prioritizes judicial settlements[75] and where the issue of coerced settlements by judges is prevalent,[76] the affiliation of ADR procedures,

[72] Kimberlee K. Kovach, *supra* note 68, at 762.

[73] For instance, statutes were enacted in 1987 in both Florida and Texas authorizing the courts of the states to actually mandate and order pending litigation cases, civil and family, to mediation. THE TEXAS ADR ACT, CH. 154.001 ET. SEQ.;TEX. CIV. PRAC. & REM. CODE; FLA. R.CIV. P. 1.700(a).

[74] Several scholars commented that ADR, when combined with courts, lost their potentiality; *see* K. Kovach*, supra* note 68, at 764; Robert A. Baruch Bush & Joseph P. Folger, *supra* note 71, at 743; Jacqueline M. Nolan-Haley, *Mediation: The New Arbitration*, 17 HARV. NEGO.L. REV. 61 (2012); *See also* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L. J. 399 (2005); Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29 (2000) (noting the variety of adversarial activity in mediation); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58 (2004); Ellen E. Deason, *Procedural Rules of Complementary Systems of Litigation and Mediation-Worldwide,* 80 NOTRE DAME L. REV. 553 (2005).

[75] In the U.S., less than 1% of the filed civil cases are resolved through a trial at the federal level, *see U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2018,* DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2018.pdf (in 2018-19 just 0.9% of federal civil filings reached trial); *U.S. District Courts–Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2021*, DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, HTTPS://WWW.USCOURTS.GOV/SITES/DEFAULT/FILES/DATA_TABLES/JB_C4_0930.2021.PDF (in 2020-21 just 0.5% of federal civil filings reached trial).

[76] See, e.g., Owen M. Fiss, *supra* note 52, at 1073; Judith Resnik, *supra* note 52, at 494; Jules Coleman & Charles Silver, *supra* note 52, at 102; David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1980–81 (1989); James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG. 12 (1999); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEG.

which are inherently aimed at reaching a settlement, with this system (and its issues) has diminished their charm.[77] These brought the ADR, and especially mediation in a coma.[78]

At a first glance, a comparison between the path of these two forms of ADR in U.S. and in Italy reveals a common trajectory. In other words, the evolution of these institutions appears strikingly similar in both systems. However, a more detailed examination uncovers that despite this shared trajectory, the civil procedural context in which this evolution has taken place, particularly the distinct approaches to settlement in the two systems, indicates the need for divergent paths for the development of these two institutions. These paths ultimately converge in an approach that should encourage both institutions but in contrasting ways.

In particular, in the Italian system, the incentives towards conciliation have undergone a complex legislative evolution. This can be attributed to an approach that strongly upholds a public view of the judicial system, which was established after the era of totalitarian regimes. Consequently, judges adopt a cautious stance towards amicable dispute resolution and often only encourage settlement in a formal manner. As a result, alternative dispute resolution methods have faced difficulties in gaining traction, as the prevailing belief is that only the state judiciary can dispense justice. This highlights the significance and purpose of legislative developments within the Italian context, which seek to integrate these alternative forms of resolution within the court, the state, and its judges; like indeed the compulsory mediation.

STUD. 949 (2004); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEG. STUD. 459 (2004).

[77] Kimberlee K. Kovach, *supra* note 68, at 768; *see also* Frank E. A. Sander, *The Future of ADR*, 2000 J. DISP. RESOL. 3 (2000) (commenting that mediation remained "a grain of sand on the adversary system beach"); see also Robert A. Baruch Bush & Joseph P. Folger, *supra* note 71, at 741 (discussing that "mediation is presently underutilized almost everywhere, and that the reason for this phenomenon is that the public simply doesn't grasp the great value of the process due to inadequate outreach and education efforts about mediation as an alternative to the legal system").

[78] Many scholars have discussed the causes of this coma. In particular, for an in-depth discussion, see the Symposium organized in 2014 by Cardozo Law School and its Journal of Conflict Resolution, titled "Is Mediation a Sleeping Beauty?". The main aim of the Symposium was to answer the following questions: "Is the mediation Sleeping?", "Is She Beautiful?", "Who is the Wicked Witch?" and "Who is Prince Charming?". The results of the Symposium are available here https://www.cardozojcr.com/symposium-2014.

The situation in U.S. is entirely opposite. Specifically, the development of these institutions occurs within a context where court-led settlement holds significant importance within the system, strongly connected to the judiciary. Consequently, literature on the subject endeavors to mitigate the drawbacks associated with this approach and its coercive power wielded by judges. Consequently, mediation and negotiation were initially viewed with skepticism since they appeared to restrict parties' freedom to determine outcomes, prompting the need for their separation from the court.[79] In other words, the U.S. system should strive to establish a multi-door system characterized not only by numerical diversity but also qualitative differentiation. In a system where debates persist on identifying optimal strategies to prevent the excessive reliance on settlement during the course of litigation, mediation and negotiation must emerge as genuine alternatives to state courts. They should function as forums where such concerns do not arise, thereby establishing a clear distinction between private and public realms of justice.

The aforementioned considerations highlight the crucial importance of engaging in a thoughtful discussion that emphasizes the need for a careful management of the "legal transplants".[80] In other words,

[79] Kimberlee K. Kovach, *supra* note 68, at 769 (advocating that "we can visualize mediation colliding with litigation as a small car and a large truck). In either of these examples, the smaller object, mediation, would sustain greater harm"; Owen M. Fiss, *supra* note 52, 1073 (presenting fear that if mediation would be used as a first step, then perhaps there would not be sufficient cases to continue the legal system's reliance on precedent);

[80] The legal transplant refers to the attitude to borrow law from another legal system. The theoretical debate on the possibility and the benefits of legal transplants has been truly polarized. One extreme argues that legal transplant is logically impossible because any legal transplant is only skin-deep, it is only words, the law on the books. In this sense law has not an autonomous existence. Law mirrors the society where it exists; thus, when it is taken away from his root, it finishes to exists. For this position see P. Legrand, *The Impossibility of "Legal Transplants*", 4 MAASTRICHT JOURNAL OF EUROPEAN COMPARATIVE LAW 111 (1997); see also L. FRIEDMAN, A HISTORY OF AMERICAN LAW 595 (2ND ED, 1985). At the other extreme, it is sustained the great importance of legal borrowing by reference to the scale of the reception of Roman law and the spread of English common law. Law can be transplanted and has the capacity of a truly long life. In this sense, a borrowed law can also unreflect the society's needs where it is transplanted because the society apt itself to law. For this position see A. Watson, *Comparative Law and Legal Change*, 37 CLJ 313 (1978). For more insights on this concept see, generally, A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1993); M. Graziadei, "*Comparative Law as the Study of Transplants and Receptions*" in M.

mediation and negotiation both share fundamental principles that underpin the effectiveness of these two institutions. They also share shortcomings, which have somewhat hindered their progress. However, the path to resolving these issues differs and a mere transplant should be avoided: in the case of the United States, the princes charming to awake these sleeping beauties is represented by an attitude to move away from state courts, whereas in Italy, it entails closer alignment with them.

B. Resembling the U.S. Pretrial Phase.

After the Reform, it is inaccurate to describe the U.S. and the Italian civil proceedings system as the spitting image. However, it is fascinating to note that the Italian legislator has significantly narrowed the gap between the two models, even if unintentionally, especially with reference to the pretrial phase. This last consideration requires a thorough and wide-ranging discussion.

The traditional dichotomy between the adversarial and the inquisitorial model is one of the main images of the distinction between common law and civil law systems becomes blurred.

Firstly, even before the Reform, the strict dichotomy between the U.S. system as a pure adversary and the Italian one as a pure inquisitorial was an erroneous representation. This mistake was due to erroneous stereotypes referred to certain (artificial) inquisitory characteristic of the Continental European systems, as the Italian one.[81] Even we do not want to examine, deeply, these stereotypes with this article,[82] we can make one example. It has been widely claimed that in Continental inquisitorial system, like the Italian one, the powers to identify legal issues and the facts will be subjected to proof pertained to judge.[83] Differently, the

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REIMANN AND R. ZIMMERMAN, THE OXFORD HANDBOOK OF COMPARATIVE LAW (2007).

[81] *See* Michele Taruffo, *Aspetti Fondamentali*, *supra* note 12, at 32 (which notes that nothing has been weirder to the history of civil law than a truly inquisitorial model of civil process); *see also* Astrid Stadler, *The Multiple Roles of Judges in Modern Civil Litigation*, 27 HASTINGS INT'L & COMP. L. REV. 55, 56 (2003).

[82] For a deeper discussion on the matter see Cesare Cavallini & Stefania Cirillo, *supra* note 4 (forthcoming).

[83] HERBERT J. LIEBESNY, FOREIGN LEGAL SYSTEMS (4TH ED., 1981); JOHN H. MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA (2TH ED., 1969); *see also* Benjamin Kaplan, Arthur T. von Mehren, Rudolf Schaefer, *Phases of German Civil*

term *inquisitorial* reflects any significance within the Italian system of civil justice with the claimed meaning we mentioned. Since the 1806 Napoleonic Code, the civil proceeding structure has been drawn along a specific conceptual framework: the material facts and its allegations have been in the exclusive parties' power since the introductory pleadings.[84] The parties' lawyers take indeed the primary responsibility to identify legal issues at stake and sharpen the legal analysis, along with the facts will be subjected to proof (*i.e*., the *thema decidendum et probandum*). Moreover, the possibility for the judge to introduce facts *sua sponte* is strictly forbitten since it represents a violation of the judge's impartiality principle, provided by Section 111, paragraph 2 of the Italian Constitution.[85] With reference to evidence requests, the Italian judges have very limited powers to introduce evidence by their initiative,[86] and these limited powers are subject to stringent limitations which allow the control by parties.[87] The crucial difference between the adversarial and non-adversarial

Procedure (pts. I & 2), 71 HARV. L. REV. 1193, 1443 (1958) (discussing German system as an example of the inquisitorial process).

[84] John H. Langbein, *supra* note 12*,* 824; *see also* Burkhard Bastuck & Burkard Gopfert, *Admission and Presentation of Evidence in Germany*, 16 LOY. L.A. INT'L & COMP. L.J. 609 (1994).

[85] According to COSTITUZIONE [COST.] (It.) § 111.2 "*All court trials shall be conducted with adversary proceedings and parties shall be entitled to equal conditions before a third-party and impartial judge*".

[86] Section 115.1 of Italian Code of Civil Procedure states that "*save where otherwise provided by the applicable law provisions, the judge shall base his decision on the evidence offered by the parties or by public prosecutor, as well as on the facts which have not been specifically denied by the party who filed his appearance*"; [translated and reprinted in SIMONA GROSSI & CRISTINA PAGNI, *supra* note 27, at 160]. More specifically, these judge's evidentiary powers are mainly the following: the possibility to order inspections of persons and objects (Section 118 of the Italian Code of Civil Procedure); the possibility to ask information to public administrations (Section 213 of the Italian Code of Civil Procedure); the possibility to summon a witness who has been mentioned by another witness during a deposition (Section 257 of the Italian Code of Civil Procedure); the possibility to summon a witness who has been mentioned by the parties' as individuals knowing certain facts (Section 281-*ter* of the Italian Code of Civil Procedure).

[87] The decisionmakers are obliged to submit the evidence they introduce to parities' contradictory debate, in order to allow them to exercise their defenses, also by submitting their counter-evidence. Moreover, Judges' evidentiary initiative may not be justified by the deficiencies of the evidence requested by the parties to ascertain the facts. Indeed, the judge's powers to order specific evidence may be exercised only if they are grounded on the facts alleged by the parties.

system can be found on the moment in which the judge comes into the scene, the different role played by the judge in the early stage of the lawsuit (the introductory phase as per the Italian system, the pretrial as per the U.S. system), the role of the first hearing (the preliminary hearing under Section 16 FRCP for the U.S.), along with the managerial power of the judges in conducting the lawsuit.

Secondly, the evolution of the rules governing the processes around the world allows the distinction to become vaguer, especially with reference to the pretrial phase. In the next paragraph B.1. we will refer to the evolution of the rules as emerged by the Reform that narrowed the Italian introductory phase of the proceeding to the U.S. one, especially by giving another scope to the first hearing. Conversely, in the paragraph B.2., we will demonstrate how the evolution of the U.S. pre-trial phase demonstrates that shaping it as a pure adversarial model is mistaken and misleading, in so confirming the affinity of the two systems.

B.1. The Scope of the Renewed Italian First Hearing and the Semi-Adversarial Discovery Phase.

As we said Italy does not know the distinction between pre-trial and trial: a claim implies only a single event (the trial), structured in several hearings.[88] Moreover, it does not know the trial by jury: the only decisionmaker must be, always, a judge.[89]

As we saw in paragraph II.B., the Italian new model refuses the unrealistic drive of a complete *sine judice* information gathering, as well as to formally split the litigation into pretrial and trial phases. Nonetheless, this remaining genetic structural difference did not impede the narrowing of the two systems. The peculiarity of the new Italian civil proceeding structure and specifically the new scope of the first hearing, is that it turns on the particular (and new) judge's role in determining the ending type at the first hearing, after being thoroughly informed of the dispute's matter, in terms of the presentation of facts, documents' exhibition and the complete individuation of the facts on which the witnesses will testify *after* the first hearing.[90] In other words, the new relevant judge's role in the Italian civil proceeding is the possibility of addressing the dispute's end at the first hearing and thus, before

[88] OSCAR G. CHASE, HELEN HERSHKOFF, ET AL., *supra* note 12, at 341-2
[89] *Id.* at 341
[90] See Section II.B. of this Article.

completing of the evidence collecting phase (*i.e.*, the hearing for questioning witnesses and parties that occurs following the first hearing, as it is in the trial phase in U.S.), but after having acknowledged the relevant facts and evidence requests. The range of possible measures the judge might take is wide, from scheduling the hearing for questioning the witnesses and the parties to the promotion of a judicial settlement between the parties, or a summary adjudication.[91] These outcomes definitively required the judge to have a complete and reasoned knowledge of the facts and evidence requests before the first hearing.

Several considerations arose by this new model.

On the one hand, there is no doubt that the Italian new civil proceeding model does not involve the pure and complete discovery without judge as the traditional U.S. pretrial model was designed.[92] However, the renewed Italian structure of the civil proceeding refuses a system where the discovery must take place *under the judge's control* and *after the preliminary hearing*. On the other hand, this renewed structure raises the

[91] See Section II.B. of this Article.

[92] See Section III.B2 of this Article. Consider that the traditional adversary system, as designed by the 1938 U.S. Federal Rules, provided that following the filing of the claim by parties, the judge did not intervene during the pre-trial stage. Judge's involvement occurred only if requested by parties (e.g., for granting a motion for summary judgment, a date for trial, a pretrial conference). The parties might indeed commence discovery, negotiate a settlement, or make no activities for years without any judicial control. Nonetheless, the 1938 Federal Rules allowed litigants to ask for court's help. Towards the years judges' role in ruling on discovery issues became qualitatively different from their role in the traditional model. Indeed, to decide discovery questions, the judges (i) must immerse themselves in the factual details of the case, (ii) must consider the parties' litigating strategies, (iii) besides reading parties' briefs, they often must engage in lengthy and informal conversations with the parties (iv) by granting or denying discovery requests, they alter the scope of suits by making some theories and proofs possible and others unlikely; becoming thus involved in the lawsuit. Then, Amendments to the Federal Rules provide rules for pretrial management in all cases, expanding the federal judge's pretrial powers noticeably. For an eloquent disquisition on the role of the parties in preparation for trial, along with a description of the growth of judicial case management towards years, *see* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 384 (1982). The Author explains how the role of the parties in preparation for trial was even more autonomous before 1938 Federal Rules of Civil Procedure, quoting Robert W. Millar, *The Mechanism of Fact-Discovery*, 32 ILL. L. REV. 424, 449 (I937) and Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869-77 (1933) for a discussion concerning state court innovations with respect to common law discovery (at note 64).

question of whether the new Italian civil proceeding's structure might resemble the American one, as the following comparative considerations on the U.S. fact-gathering model might show properly.

The new Italian civil proceeding eloquently demonstrates that a comprehensive preliminary phase, where facts and evidentiary material are collected and there is a duty of complete disclosure, can be exercised as a continuous process, rather than being formally divided into distinct stages, and thus it does not necessarily require a strict division between pretrial and trial as the U.S. traditional model informs. In other terms, the traditional distinction between the discovery phase and the taking of evidence phase, which is representative of an adversarial model[93] (activities that occur to pre-trail and trial, respectively), can be merged with a proceeding that works in different installments,[94] as the new Italian ones, which finally remains a non-adversarial procedure: the judge continue to have relevant managerial role in conducting the trial, especially with reference to the taking of evidence phase.

The Americanization of the new Italian civil proceeding conferred a new role to the first hearing and the relevant new comprehensive preliminary phase. Consider that before the Reform, the first hearing was devoted to a mere meeting between the parties' lawyers before the court and it resulted a worthless and redundant step of the civil proceeding.[95] The parties' lawyers went to the first hearing just to request to be allowed to file the three pleadings for specifying/modifying their facts and their evidence requests, without any discussion.[96] The new approach has several benefits. In terms of efficiency of the administration of the system of justice, it can help expediting the final decision-making process and potentially reducing the need for a lengthy and costly trial.[97] In terms of

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[93] OSCAR G. CHASE, HELEN HERSHKOFF, ET AL., *supra* note 12, at 251, 281.

[94] For a general overview of the new Italian civil proceeding following the Reform *see* PAOLO BIAVATI, ARGOMENTI DI DIRITTO PROCESSUALE CIVILE (2023).

[95] See Section II.B. of this Article.

[96] Cesare Cavallini, *supra* note 28, at 161

[97] Many Authors highlighted the efficient results brought by a complete preliminary conference and the relevant role of discovery. *See* John P. Frank, *Pretrial Conferences and Discovery - Disclosure or Surprise*, 1965 INS. L.J. 662 (1965) ["There are two fundamental purposes for eliminating surprise at trial. The first is to improve the administration of justice by securing a fair, equitable, reasonable, and just result. The second is to speed trial so as to consume less time for counsel, for parties, and, more important, for the courts. The two objectives are closely interrelated"]; *See also* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1-5 (1988) (The Author

effectiveness of the system of justice, if the subject of the dispute, the documentary evidence, and the non-documental requests for evidence are straightforward and specified at the first hearing, with any possibility of amendments or additions, this hearing assumes essential functions, marking a significant change in the Italian procedural model. First, the parties assume a more autonomous role before the hearing, where the process is now truly adversarial and entirely leads to parties and their battle to discover and gather more information.[98] Secondly, it leads to introductory pleadings with a high degree of sufficiency on the set of facts. Complete introductory pleadings, along with a comprehensive discovery means a precise circumscription of the subject matter of the dispute. This helps to remove from the process the facts that are not valuable in deciding. In this wise, they induce the judge to correctly play a role oriented to a fair and just decision.[99] Thirdly, since the judge conducts the first hearing by clearly knowing the boundaries of the dispute, to the extent of being able to provide for the decision, the principle of concentration, along with the principles of immediacy and orality,[100] representing cornerstone of the Italian civil procedure and also

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emphasized how an advantage of attorneys conducting discovery is that both sides can develop a real sense of the case's monetary value and the potential risks of the case. This may help the attorney to evaluate the merits of the claim and the settlement options);

[98] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 422– 427 (2nd1977) (the relevant result analyzed by the Author is that a pretrial discovery provision could enable each party to improve and refine its estimates on the outcome of the case, reducing uncertainty and optimism in the outcome).

[99] In this respect, the factual sufficiency standard is a good proxy for meritlessness and, thus, it helps in the aspiration to fairness-related. See on the matter Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV., 1293, 1348 (2010). See also Edson R. Sunderland, *Growth of Pre-Trial Procedure*, 44 COM. L. J. 407 (1939) ("truth in pleading means, of course, the existence of a reasonable basis in fact"); Clarence L. Kincaid*, A Judge's Handbook of Pre-trial Procedure,* 17 F.R.D. 437 (1955) reported in SHELDEN D. ELLIOT, DELMAR KARLEN, CASES AND MATERIALS ON PLEADING AND PROCEDURE BEFORE TRIAL 342 (1961) (the Author consider that "a comprehensive pre-trial conference enables the judge to ensure that "neither surprise nor technicalities win the battle"); HANS ZEISEL, HARRY KALVEN, BERNARD BUCHHOLZ, DELAY IN THE COURT, 141-54 (1959) (considering that a judge adequately informed of the issues on which will be called on to rule has the desirable effect of decreasing errors of law and minimizing appeals).

[100] *See*, overall, GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE, 371-2 (1934). More specifically, the principle of concentration indicates that a case should be treated in a single hearing or in a few closely spaced oral sessions

the values behind the U.S. "day-in-court",[101] become more effective.[102] In other terms, by allowing for a continuous process that combines elements of an adversary system, like discovery, with aspects of a non-adversarial procedure, like the managerial role of the judge at the hearing, this structure seems apt to strike a balance between efficiency and fairness in resolving legal disputes.

Given that, the essence of the renewed structure of the Italian civil proceeding grounds on the complete and final determination of the elements of facts of the dispute and the related instances for the relief *before* the first hearing. Nothing new or striking, one would say, from the classical U.S. pretrial phase, related to the Rule 16 FRCP preliminary conference's function; something different, nevertheless, from the (Italian) judge's point of view. Yet, the crucial point is given first by the *scope* that the new first hearing should perform within the renewed Italian civil proceeding, and accordingly in what it inspires

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before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded. While the principle of immediacy refers to a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof. Finally, the principle of orality means an efficient, swift, and simple method of procedure, based essentially on an oral trial in which the adjudicating body is in direct contact with the parties (not only with their counsel) and the witnesses.

[101] See *supra* note 29.

[102] The principle of concentration has been considered as a prerogative of the adversary model of civil justice. See, *e.g.*, *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L. J. 529-30 (2012); Benjamin Kaplan*, Civil Procedure-Reflections on the Comparison of Systems*, 9 BUFF. L. REV. 409, 419 (1959- 60). However, it is important to note that this principle also exists in Continental legal systems and holds significance as an ancient cornerstone for interpretation, study, and reforms in countries such as Germany or Italy. While the traditional Anglo-American interpretation of the principle of concentration is correct, it is also partial in its understanding. The changes in the role of the judge and the scope of pretrial proceedings offer an opportunity to conceive of this principle with a greater focus on the judge's role rather than solely on the idea of a single final hearing. This approach aligns more closely with the Continental view of this principle, and especially with that emerged by the Reform in Italy. In essence, the principle of concentration emphasizes the importance of focusing and consolidating the proceedings, ensuring that the relevant issues are addressed in a comprehensive manner. While its interpretation may vary across different legal systems, recognizing its existence and understanding its broader implications can contribute to a more nuanced understanding of procedural principles and foster cross-jurisdictional dialogue.

similarities to the U.S. pretrial phase outcomes. Undoubtedly, the most important tool has been the renewed scope of the first hearing and the related judge's role and powers during and afterward this hearing. Technically speaking, a possible meaning of the Americanization of Italian civil justice reform is that both legal families share a common framework, notwithstanding they come from different civil proceeding schemes, and some divergences remain. This common framework is due to the close relationship (now also in the new Italian civil proceeding) between the declaring of the so-called *thema decidendum atque probandum* (alleged facts, documents, and presentation of oral proofs) by the parties *before* the first hearing and the function of this hearing itself.

The Reform confirmed nonetheless the judge's role in conducting the dispute and especially the collecting of oral evidence following the first hearing. Consider that another stage regards the procedure of evidence collection itself as the examination of a witness, where Continental systems present a stark contrast to the common law. Evidence-taking in Anglo-American system is characterized by a strict association of all evidence with one or the other party. This leads to the counsels' powers to prepare and directly examine the witnesses, as also the experts, through the cross-examination technique.[103] Instead, the Continental administration of justice assigns the taking of evidence to the judge and strongly disapproves the counsel's preparation of the witnesses. For this reason, when the court accepts counsel's evidence initiative, the evidence become a court's source, and the tie between witnesses and the counsel weakens.[104] The Reform renounces to get the purpose of a dispute with a

[103] The adversarial model of evidence-taking at trial emphasizes a crucial characteristic wherein all evidence is associated with one of the parties. The structure of the evidence-gathering methods during the trial phase is designed to shield decision-makers from extraneous and impermissible information while ensuring fair play between the parties. As a result, witnesses are aligned with the party that called them. This association between the parties and their witnesses is highly valued, particularly in common law systems where counsel is permitted to prepare and coach witnesses for their courtroom appearance. Moreover, attorneys directly question witnesses, often utilizing cross-examination techniques. See MIRJAN R. DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 12, at 76 who speaks about the "*polarization of means of proof*".

[104] Under the Italian Code of Civil Procedure, the judge or other officials are assigned the task of collecting oral evidence, while the involvement of counsel in preparing witnesses is strongly discouraged. The judge assumes responsibility for questioning parties and witnesses, selecting expert witnesses, and recording the

mere passive judge by echoing their essential role in the taking of evidence. That is, for instance, in the questioning of witnesses and the possibility of calling an expert. On this last aspect, the Reform has made no change in the rules governing the ordinary proceeding as it is still ruled. However, it makes a significant step forward even in this sense towards the U.S. system in the rules governing the Negotiation.[105] The new out-of-court discovery during the *Negotiation* assigned a new relevant role to lawyers straight in these terms. As said, in the procedure of *Negotiation*, a type of A.D.R., the lawyer might now directly question the witnesses and the parties. If we consider that, on the one hand, in case of the *Negotiation* fails, the statements gathered by the lawyers might be used in the subsequent trial, and on the other hand, the *Negotiation* is compulsory for certain types of disputes, we can severely put the narrowing of the two systems to a step forward also in respect of the methods for the taking of evidence.[106]

B.2. U.S. continuing path towards a Semi-Adversarial Model.

To gain insight into the Americanization of the new Italian model of civil proceedings, we can make a reverse analysis of the U.S. system. In particular, the key factor that contributed to the convergence of the two models, prior to the Reform, was the reduction of adversarial features within the U.S. system. The evolution of the adversarial (U.S.) civil justice systems, doubling the phases between pretrial and trial by jury,

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gathered evidence. *See* CESARE CAVALLINI, *supra* note 43, at 150,156; see also OSCAR G. CHASE, HELEN HERSHKOFF, *supra* note 12, at 350; see also Franklin Strier, *supra* note 4*,* at 111.

[105] See Section II.A of this Article.

[106] For the benefits of a competitive procedure for taking the evidence, where a crucial role is played by lawyers instead of the judge *see* JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE, VOL. 5, N. 212 (HUNT & CLARKE 1827). See also WILLIAM TWINING, RETHINKING EVIDENCE, (2ND2006); JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW (5TH1974). Other scholars believe that mitigation of parties' powers for fact-finding may overcome adversarial distortion or manipulation of the evidence. See Marvin E. Frankel, *Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1033, 1037 (1975) Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 Stetson L. REV. 727 (2007), Susan Haack*, Truth and Justice, Inquiry and Advocacy, Science and Law*, RATIO JURIS 15-26 (2004).

demonstrates a progressive downsizing of the purely adversarial framework and splitting the two phases of the proceeding.[107]

The progressive downsizing of the pure adversary system model has unfolded through twofold specific circumstances which have affected the pretrial phase. First, a broader judicial activism in the management of discovery has been increased progressively;[108] secondly, an increasingly active role in promoting settlement, to the point of arousing severe reactions in terms of "coerced settlement" by many scholars who have monitored the traditional institutional structure of the U.S. civil justice within the constitutional sources of the American legal system.[109]

A brief examination of this progressive adaptation of the U.S. adversarial system to a more active role of the judge in managing disputes is exciting and valuable to justify a compatible structure of the new model brought by the Reform. The echoing by the U.S. system to the Continental model of civil law, unfolding at various moments of the pretrial phase, involves a renewed activism of the judge in the management of the discovery phase, over time "abused" by the lawyers[110] and therefore become excessively expensive for them (the so-

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[107] *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 447 (6TH ED. 2021).

[108] *See*, e.g., Judith Resnik, *supra* note 92*,* 374; Stephen A. Saltsburg, *The Unnecessarily Expanding Role Of The American Trial Judge*, 64 VA. L. REV. 1 (1978), 1; S. Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts,* 29 BUFFALO L. REV. 487 (1980); Owen M. Fiss., *supra* note 52, at 1073; M. Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 258-59 (1986); id., supra note 76, *at* 459–570; Judith Resnik, *The Privatization of Process: Requiem For and Celebration Of the Federal Rules of Civil Procedure at 75*, 162 UNIV. PA. L. REV., 1794 (2014); R. J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV., 125 (2018).

[109] See, e.g., S. Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1200 (2000); L. M. Warsarwsky, *Comment, Objectivity and Accountability: Limits on Judicial Involvement in Settlement*, 1987 U. CHI. LEGAL F. 369, 371– 74.; Judith Resnik, *Judging Consent*, U. CHI. LEGAL F. 43, 73 (1987). *See* also in a broader comparative view, Cavallini & Cirillo, *supra* note 38.

[110] *See*, *e.g.,* Frank H. Easterbrook, *"Discovery as Abuse,"* 69 B.U. L. Rev. 635 (1989); Linda S. Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV. 1393 (1993-1994). It is worth noting also that the so-called "abuse of discovery" has been one of the crucial points raised by the U.S. Supreme Court in modifying the pleading's determination: see, recently, properly from a civil law lecture, Cesare Cavallini, *The Determination of the U.S Pleading from. A Civil Law perspective,* 21 WASH. UNIV. GLOB. ST. L. REV., 155 (2022), at 166.

called *fishing expedition*).[111]Judicial activism has not notably embodied a sanctioning approach to the excessive requests for discovery, it has also influenced a noticeable control of the pleadings. In this wise, the identification of claims, typical of the Continental judicial practice, reshaped the U.S. pleading's content, to the extent that it becomes the primary indicator of the subject discovery.[112]

From a broader perspective, it is worth noting that the crisis of the purely adversarial model is also and even more evident in the current UK legal system, starting from Lord Wolff's reforms of 1999.[113] The overcoming of the pre-existing model takes place first through a renewed and active role played by the judge by dealing with the dispute according to different procedural paths, depending on the greater or lesser complexity of the dispute. However, while retaining the judge's discretionary power, the dispute's allocation is based on the scrutiny of the introductory pleadings and the trace of the dispute carved in the discovery disclosure, strictly centered on claims.

The relevance of managing judging in the renewed English system, especially in cases of first-rate value and complexity,[114] refers to the centrality of the process' direction by the judge from the beginning, in so resembling at a general level the early crucial role assigned to the judge

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[111] *See* Stephen Subrin, *Fishing Expedition Allowed: The Historical background of 1938 Federal discovery Rules*, 39 B.C.L.R. 691 (1998).

[112] *See* Cesare Cavallini, *supra* note 110, at 155; FRIEDENTHAL ET AL, *supra* note 107, at 426. For instance, the Amendments in 2006 and 2015 regarding aspects of the discovery process, and generally Rule 26 (f) emphasizing plans for pretrial discovery, work all together with Rule 16 as managing tools "facilitating the decision of the case on its merits". See also Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60, DUKE L. J. 669 (2010).

[113] *See* John A. Jolowicz, *The Wolff Report and the Adversary System*, 15 C.J.Q .198 (1996); more recently, see JOHN SORABJI, ENGLISH CIVIL JUSTICE AFTER THE WOLFF AND JACKSON REFORMS 107 (2014).

[114] *See* the so-called *Allocation Questionnaire* and the (eventual) *Allocation Hearing* provided by Part 26 -29 of the CPR, by which the cooperation between lawyers and the judge, more than the traditional adversary model, engages the managerial role of the judge in determining the right track for the lawsuit: *see*, e.g., ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE – PRINCIPLES AND PRACTICE, 277, (4th ed. 2021). The possible triple allocation of the lawsuit (small track, fast track, and multi-track) grounds on a very active judge's role that deals with, and it is not against the adversary role played by the parties' lawyers with the pre-action disclosure. Orders, directions, and case management of the judge is an essential task provided by the CPR Rules in order to address the lawsuit toward the best efficient outcome.

in most of the Continental systems. Yet, the outcome of the downsizing of the Anglo-Saxon systems traditionally based on the pure adversary system model undoubtedly reveals a progressive alignment of the adversary systems with those of Continental tradition.

The new managerial approach of the judge confers another relevance the pretrial conference. Judicial activism has taken place to seek complete knowledge of the facts and the related claims before the pretrial conference, and to determine the discretionary set and content of the authorized, even not required, pretrial conference according to Rule 16 of the Federal Rules of Civil Procedure.

So that the pretrial conference, created to enhance orality and prepare the dispute for the trial, has progressively changed its scope, favoring the end of the conflict with various procedural devices.[115] The growing relevance of the pretrial conference is viewed as a "nontrial procedure",[116] since it generates the conditions in which parties are allowed not to pursue the trial, preferring to be subject to a summary judgment or to arise to the settlement of the case. The typical model of the common law process is now organized basically in a single phase, *i.e.*, the pre-trial. Here, the parties, under the direction of the judge, clarify the boundaries of the dispute, acquire information about their respective defenses and the evidence that might be used in the possible trial stage, consider the possibility of a settlement or other ways of prompt resolution of the dispute. Therefore, since 99% of all civil cases are resolved without a trial,[117] the pre-trial conference is useful to its original scope (*i.e.*, to prepare the trial) only when it works badly, that is, the rare cases in which all the mechanisms set up to ensure an early close of the case fail.

Here we can make a step forward.

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[115] The transformation of the scope of the pretrial conference regulated by Rule 16 of the Federal Rules has been the subject of a wide debate among the U.S scholars (*see*, for example, David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1973–74 (1989). See also, Thomas D. Rowe, *Authorized Managerialism Under Federal rules- And the extend of Convergence with Civil – Law Judging*, 36 SW. U. L. REV. 191 (2007); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 938–40 (2000); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761, 790–91 (1993). E. Donald Elliott, *Managerial Judging, and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 308–09 (1986).

[116] See John H. Langbein, *supra* note 102, at 542.

[117] See *supra* note 75

The Reform may become a guideline to read the role of the pretrial conference(s). Firstly, the pretrial discovery is often used to define the issues and facts arose by introductory pleadings.[118] Secondly, the unceasing supervision of the judge who directs the discovery with peculiar "orders" governs the pretrial conference and influence the ending-type of the dispute. Pretrial phase saw now a judge dealing with jurisdiction issues, stay issues, ordering admissions or stipulations of the parties, list of witnesses, and generally of evidence to be discussed between lawyers at the final pretrial conference. This kind of broad and discretionary power of the pretrial judge does not necessarily move towards the trial (which is now poorly applied) but either towards different decision devices (above all, the motion to dismiss and the summary judgment)[119] or settlement proposals, as we said. Thus, the pretrial conference has the mainly scope to understand if there are possibilities to "prevent" the trial.

Starting from this point of view, the gap between the Anglo-Saxon systems (and the U.S one mostly) and those of civil law is substantially reduced, while maintaining each its own identity from a structural point of view.

Having defined the model of civil proceedings in dominant rise at the international level as semi-adversarial means, on the one hand, the progressive leave of pure adversarial by the Anglo-Saxon systems. On the other hand, this global model correctly finds in the new Italian civil justice system some echoes and profiles of the adversary system despite the different traditional framework and historical tradition, as it has always been centered on the active role and judge since the beginning of the proceeding. Yet, while the U.S. system has progressively

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[118] *See* JACK H. FRIEDENTHAL ET AL, *supra* note 107, at 447 and related footnotes. This usual judicial managing behavior pursues also Rule 16 (c) (2) (M), that expressly provides with the necessary pretrial conference to set a *separate* trial regarding specific issues of facts related to a claim, counterclaim, or crossclaim.

[119] The increased use of the motion to dismiss and the summary judgment is the result of the changed pleading's determination, following the well-known *Twombly* and *Iqbal*, which have definitively abandoned the original path of the notice pleading to reach the formulation of a judicial request that immediately identifies the relevant facts suitable to support the claims to obtain the relief. *See* e.g., Stephen B. Burbank, *Pleading and the Dilemmas of Modern American Procedure*, 93 JUDICATURE 109, 110 (2009); Robert. G. Bone, *Twombly Pleading Rules, and the Regulation of Court Access,* 94 IOWA L. REV., 873, 882-90 (2009); Richard L. Marcus*, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV., 433, 466-471, 482 (1986).

acknowledged the judge-manager as an unavoidable role played by the pretrial judge in governing the case since the beginning, the Italian reformed one has appointed to the first hearing the exact scope of the U.S. pretrial conference. The crucial common point of view is thus merely due to the active and informed judge's role in approaching the case. For the American civil process or the Italian ones, divergent policies now converge to the same outcome. The first hearing, or the pretrial conference, as they are the fence to move to the trial or the evidence and adjudicatory phase, needs both all the issues of facts and the evidence requests to be definitively set forth before moving on. This complete acknowledgment is directed not only to prepare the trial but, especially, to allow different devices for ending the case without a trial or formal adjudication.

While the American civil proceeding framework has progressively shifted towards a more active judge's role in granting an effective and efficient preliminary conference, the Reform has deliberately chosen to provide a space, before the incoming of the judge in the scene, to be devoted only to the battle of the parties. Given the similar outcomes of the first accurate contact between parties and the judge, one might say that, on the one hand, some traditional differences between common and civil law will be set aside. On the other hand, one can note that also some remaining structural divergencies – like the dichotomy pretrial and trial – cannot impede standing for the semi-adversarial model,[120] as a general and efficient outreach beyond the country-specific boundaries of the civil justice provisions worldwide. Despite commonalities and divergencies, this technical comparison goes straightforward a more general tendency, that is the natural outcome of a common semi-adversarial model of civil justice structure.

C. The Judicially-Led Settlement as a Common Outreach for Adequate Dispute Resolution.

The amendments introduced by the Reform regarding judicially-led settlements offer another chance to reflect on the convergence of systems in a double direction. While this double direction has been implemented in practice for the new role of the first hearing/preliminary conference,[121] in the case of settlements, the adjustment has only taken place in one

[120] *See* Cesare Cavallini & Stefania Cirillo, *supra* note 4.
[121] See Section III.B of this Article.

direction in practice. Specifically, the Italian system has reinforced the possibility of promoting the settlement by the judge in an installment of the procedure where the boundaries of the dispute have been delimitated, as it is in the U.S.[122] Nonetheless, we support the other direction also in this case, and, in particular, we propose to explore the possibility that the U.S. system, particularly Rule 16 of the FRCP, might implement certain procedural principles that govern (and, should govern) the judicially-led settlement within the Italian system.

The U.S. system experienced a significant increase of cases resolved through the settlement promoted or facilitated by the judge during the pre-trial, to the extent that literature talks about the "vanishing trial" phenomenon.[123] This evolution impacted severely the judicial role and its function since judges are often personally engaged in settling and resolving disputes through mediation, conferencing, and use of facilitative rather than adjudicative skills.[124] The peculiarity of the in-court settlement, amongst the other mechanism that promote agreement instead of adjudication (like mediation), is that the judge continue to be involved in the process to get the outcome of the dispute: the same person is a settler and a decider. This aspect is the primary cause for the main concerns that have arisen due to its widespread adoption. In the U.S., a massive literature grew up against the promotion of the in-court settlement for the dangers and drawbacks inherent in the uncontrolled managerial role for judges. In this wise, the main reluctance of the "against settlement" approach lies in the potential for coercion, i.e., the threat for parties and attorneys to be coerced into a settlement.[125] The directive powers of the settlement judge might have an influence on the

[122] See Section II.C of this Article.

[123] See, among others, Marc Galanter, *supra* note 76, at 459; Judith Resnik, *supra* note 52, at 783; Stephen C. Yeazell, *supra* note 76, at 2; ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); John H. Langbein, supra note *102,* at 529; John H. Langbein, *The Demise of Trial in American Civil Procedure: How it Happened, is it Convergence with European Civil Procedure*, *in* CORNELIS H. VAN RHEE AND ALAN UZELAC, TRUTH AND EFFICIENCY IN CIVIL LITIGATION 119 (2012); NEIL ANDREWS, THE THREE PATHS OF JUSTICE COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND 13 (2nd ed., 2018) (stating that civil trial has become "a rare event"); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

[124] *See* ARCHIE ZARISKI & TANIA SOURDIN, THE MULTI-TASKING JUDGE, COMPARATIVE DISPUTE RESOLUTION 2, 26 (2013).

[125] See *supra* note 76 where we indicated the literature referring to the risk of a coerced settlement.

parties' free choice to settle since they might fear that a refusal to conciliate could have a negative impact on the final decision.[126] Another argument is related to the inequality of the resources between the parties. In such sense, since the parties usually have unequal bargaining power, encouraging settlement may coerce the weaker party to accept an unfair deal.[127] Moreover, another danger has been traditionally found in the influence that the settlement activities might have on judge's independence. To this effect, the involvement in settlement makes it difficult for judges to maintain their neutrality about the case.[128]

The Reform, as we discussed before in Section II.C. incentivized notably the judicially-led settlement. More specifically, the great relevance of the new rules on this instrument does not lie in the fact that the attempt to settle is now compulsory for the judge and the judge may now make its own proposal for settlement until the final phase of the litigation.[129] They predominantly lie in the fact that the judicially-led settlement must be now compulsory promoted by the judge in a stage of the litigation where the boundaries of the controversy are set.[130] In this

[126] MANUAL FOR COMPLEX LITIGATION (SECOND) § 23.11 (1985) (warning judges not to permit their involvement in settlement negotiations to undermine the perception of judicial fairness); *see* D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES, 30–35 (1986); Resnik, *Failing Faith*, *supra* note 56, at 552 (stating that "[i]t is not only the potential absence of judicial power over settlement that is problematic; many fear that during settlement negotiations, judges may have too much authority."); *see also* James J. Alfini, *supra* note 76, at 13 (stating that "the judge has a personal interest in clearing that case off his or her docket. The parties know this and there is a high likelihood that the parties and their representatives will feel pressure, however subtle, to enter into a settlement agreement.").

[127] *See, e.g.*, Owen M. Fiss, *supra* note 52, at 1076–78 ("[S]ettlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally."). *See also* Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, *in* REFORMING THE CIVIL JUSTICE SYSTEM 13, 16–18 (Larry Kramer ed., 1996); Jules Coleman & Charles Silver, *supra* note 52, at 110 ("When one party has a significant resource or threat advantage over the other, it is reasonable to question the acceptability of the terms on which they agree to settle their dispute.").

[128] Judith Resnik, *supra* note 92, at 426– 31.

[129] See Section II.C and accompanying notes.

[130] Please note that the compulsory conciliation attempt had a troubled path, see CESARE CAVALLINI, *supra* note 43, at 503. In particular, Law number 353 of November 26, 1990, made compulsory a conciliation attempt by the judge and, to this purpose, imposed the personal appearance of the parties at the first hearing, id. With Law no. 80 of May 14, 2005, the compulsory conciliation attempt at the first

stage, the parties got a clear picture of the claims and evidence presented and requested by the other party at the new first hearing. The possibility of adding new evidence, requesting new non-documentary evidence, or defining their claims elapsed. This picture may thoughtfully affect the parties' incentives to settle the dispute.[131]

Nevertheless, it is crucial to consider the criticism surrounding the settlement when interpreting the Reform. In essence, the similarities between the two systems should serve as a cautionary signal against potential pitfalls associated with this device. Therefore, comparative research becomes invaluable in this regard. A meticulous examination of the Italian regulations about in-court settlements shows its procedural framework is well-equipped to mitigate the drawbacks highlighted in the United States system. More specifically, in the U.S, any judicial conciliation activity comes in a stage of the procedure that is not devoted to the adjudication, *i.e.*, the pre-trial. Moreover, there is no specific time window during the pre-trial dedicated specifically to the settlement in the U.S.[132] Conversely, Italian proceedings provide a specific and mandatory hearing for settlement that takes place in the presence of the parties and

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hearing was repealed because it was been considered unsuccessful, id. The reason of this unsuccess depends by the fact that the repealed compulsory conciliation attempt occurred at a stage that was the first hearing when the parties had not yet revealed their cards fully. In order to enhance the ADR mechanism, the Reform reintroduced it, id.

[131] There is a massive literature on the incentives that bring parties to litigate before the court rather than settle and on the positive impact that knowing the clear defenses of the opposing party might have on the probability to settle. See on the matter, Gary M. Fournier at al., *Litigation and Settlement, an Empirical Approach*, 71 REVIEW OF ECONOMICS AND STATISTICS 189 (1989); George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, J. LEGAL STUD. 13 (1984); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, J. LEGAL STUD. 11 (1982). Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

[132] *See* MARCEL STORME, THE APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION 117, 188–197 (1994). *See generally* E. BLACKENBURG, Y. TANIGUCHI, INFORMAL ALTERNATIVES TO AND WITHIN FORMAL PROCEDURES, JUSTICE AND EFFICIENCY, GENERAL REPORTS AND DISCUSSION, THE EIGHT WORLD CONFERENCE ON PROCEDURAL LAW, 335, 341-52 (1989) (explaining that "the full trial procedure in Anglo-America models imposes far more formal restrictions on the participants than would the Continental model of procedure. Therefore, informal alternatives are more important as a method of getting around adversarial trials than they are on the Continent. They have been institutionalized partly in the form of pre-trial handling cases, partly in the form of out-of-court bodies handling those types of conflict for which courts might potentially be invoked.").

occurred in the context of the trial which is by definition devoted to the adjudication,[133] The contrast in the structure of the proceeding leads to several reflections. Firstly, in the Italian system, the settlement is included in a proceeding aimed towards adjudication. Thus, civil law structure is hugely significant because it places the judicial conciliation and adjudication functions on the same level.[134] Secondly, civil law systems provide a specific hearing during the trial, dedicated to settlement, which is mandatory.[135] This means that the judge has not the discretion to facilitate the settlement but also the duty. Thirdly, the Italian rules regulating the mandatory hearing for settlement provides that the parties should appear in person for the discussion before the judge to be heard on the settlement proposal.[136] The judge is allowed to ask questions on the claim while discussing the terms of a possible settlement, thus enforcing equal treatment for the parties.[137] The discussion between the parties and the judge on the terms of a possible settlement is also apt to grant the judge's impartiality, as the same discussion ending in adjudication is intended to grant. Contrary, Rule 16 of the U.S. FRCP includes the judge's settlement-facilitating duties within the general context of other duties, preordered to achieve the goal of efficiency, as the duty to dispose of the case quickly[138] and confers a large judicial discretion,[139] to the extent that it is very common that the judge has *ex parte* discussions (*i.e.*, the discussion judge may have with only one party).[140] Fourthly, specific rules regulate in-court settlement and they

[133] Paolo Biavati, *Conciliazione strutturata e politiche della giustizia*, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 785 (2005) (discussing how emergence of a "structured" in-court conciliation, meaning that in civil law countries the conciliation is now a mandatory even in the process, and it is analytically regulated by the civil procedure code).

[134] *See* Michele Taruffo, *I modi alternativi di risoluzione delle controversie*, *in* LUIGI P. COMOGLIO ET AL., LEZIONI SUL PROCESSO CIVILE 152 (1998) (discussing the dialectical and competitive relationship between adjudication and in-court settlement).

[135] See Section II.C and accompanying notes.

[136] See Section II.C and accompanying notes.

[137] ROLF STÜRNER, MEDIATION IN GERMANY AND THE EUROPEAN DIRECTIVE 2008/52/EC, LA MEDIAZIONE CIVILE ALLA LUCE DELLA DRETTIVA 2008/52/CE 47-8 (2011).

[138] FED. R. CIV. P. 16(a)(1), (2), (3), (4).

[139] Ellen E. Deason, *Beyond "Managerial" Judges: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 74, 78 (2017).

[140] *See generally* JONA GOLDSCHMIDT & LISA L. MILORD, JUDICIAL SETTLEMENT ETHICS: JUDGE'S GUIDE (Am. Judicature Soc. 1996).

are autonomous,[141] and mostly they do not afford different and even independent regulations regarding other and general managerial powers, as Rule 16 of the U.S. FRCP does. In other words, the structure of the Italian framework for the in-court settlement is apt to grant to parties' procedural justice goals.[142] Italian framework enhances the litigants' perception of elements typically related to the procedural fairness. In this respect, litigants must perceive (i) that they have "voice," *i.e.*, the opportunity to express themselves; (ii) respectful treatment from the decision-maker; (iii) even-handed treatment, neutrality of forum; (iv) the trustworthy consideration from the decision-maker.[143] The result of this analysis is that U.S. system should borrow the structure sketched by civil law systems to avoid a judge's high discretionary use of managerial power which can flow into a coerced settlement and/or the other pitfalls we previously examined. This structure provides that attempts at judicial conciliation must be compulsory and conducted during the trial, in a specific hearing directed to it, and in the necessary presence of the parties. Insofar as it strengthens procedural justice, this specific framework has the virtue of reinforcing the disputants' trustiness in the judge's activities.[144]

D. The Italian New Summary Adjudication as the U.S. Summary Judgment?

[141] See Section II.C and accompanying notes.

[142] The procedural justice and its relevant rules have mainly the scope to prevent the typical flaws of the legal proceedings, such as the risk of judge's bias. See *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW, 94-108 (1990) (if people perceive the procedure as fair, they are more likely to perceive the institution providing the procedure as legitimate); E. Allan Lind, *Procedural Justice, Disputing, and Reactions to Legal Authorities*, *in* AUSTIN SARAT ET AL., EVERYDAY PRACTICES AND TROUBLE CASES 188 (1998); Tom R. Tyler, *Citizens Discontent with Legal Procedures: A social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 885-6 (1997).

[143] *See* ARCHIE ZARISKI & TANIA SOURDIN, *supra* note 124, at 57–85 (for a reflection and the relevant literature on how some procedural elements lead to perceptions of procedural justice and their powerful influence on litigants' perceptions).

[144] For a deeper discussion on the tools that U.S. system may borrow from Continental in-court settlement framework see Cesare Cavallini & Stefania Cirillo, supra note 38.

One of the most impactful tools regarding the efficiency of the Reform is due to the provisions regarding a twofold way to adjudicate the case on its merits promptly. As we specified,[145] these ending-type devices resemble, at first look, one of the most controversial devices of the U.S. pretrial ending-type, the Summary Judgment established by Rule 56 FRCP and the Motion to Dismiss set forth by Rule 12(b)(6) FRCP. The comparison between the new Italian type of summary adjudication and the U.S. summary judgment marks an eloquent path to possible Americanization, even though the comparison shows convergencies in policies' evaluations and divergencies in technical provisions.

Convergencies are clear. There is something in common between the U.S. notorious *litigation explosion* during the '80 of the past century[146] and the never-ending debate of the same occurrence in Italy in the same age.[147] Although the ways to approach the increasing civil justice demand have been different due to the country-specific framework of the civil proceeding model, one can glimpse a general commonality between the two systems in favoring specific procedural devices to ensure a quick dismissal of the case before the final adjudication. It has meant, within the U.S. legal system, "transforming the procedural device into a method frequently used to dispose litigation before trial".[148] And it has meant,

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[145] *See* II.D.

[146] See Arthur R. Miller, *The Pretrial Rush to Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. REV. 981 (2003). As Professor Miller wrote, *"*In 1986, the now-famous Supreme Court "trilogy"-Matsushita Electric Industrial Co. v. Zenith Radio Corp.,1 Anderson v. Liberty Lobby, Inc.,2 and Celotex Corp. v. Catrett - transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation. Since then, federal courts have employed summary judgment, and more recently the motion to dismiss for failure to state a claim, in cases that before the trilogy would have proceeded to trial, or at least through discovery". See 475 U.S. 574 (1986); 477 U.S. 242 (1986); 477 U.S. 317 (1986). *See* also Patricia M. Wald, *Summary Judgment at Sixty,* 76 TEXAS L. REV., 1897 (1998), who underlines the original use by courts of Rule 56 "to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer"; Diane P. Wood, *Summary Judgment, and the Law of Unintended Consequences*, 36 OKLAHOMA CITY UNIV. L. REV., 231 (2011).

[147] *See* Andrea Proto Pisani, *I processi a cognizione piena in Italia dal 1940 al 2012*, 135. 11 Il Foro Italiano 322, 330 (2012).

[148] *See* Arthur R. Miller, *supra* note 146, at 982. It is worth noting that the 2022 Italian provisions for summary adjudications are established (probably too late) to face the growing litigation explosion and consequent excessive length of the lawsuit in the country, but providing a couple of rules that, at a first look, are resembling

within the Italian legal system, more than one attempt during the last three decades to enhance new procedural devices for the same scope, even though facing a different structure of the civil proceeding.[149]

One can observe a common outcome in both systems, despite the divergence caused by the fundamental characteristics of civil proceedings, which is the avoidance of the traditional resolution of a lawsuit. Particularly, the Reform has recently introduced a two-way immediate judgment that appears to bear resemblance to the U.S. summary judgment based on the plaintiff's claims.[150] In both cases, the scope of the procedural devices has been reducing the length of the civil proceeding to avoid costs and delays when keeping to the classical adjudication is unnecessary.[151]

Once we set aside the similarities which might be raised on the scope of the common ending-types, the comparison opens to interesting insights, and to some extent it sheds lights from a different perspective on the criticism raised by Professor Miller.

The discipline of the summary adjudication provided by the Reform takes in account a relevant issue. As we said, while the goal has been the prompt dispute's resolution, the summary adjudication consists in a judge's decision, issued after the first hearing, and following a summary sub-proceeding devoted to ensuring both parties the right to be finally heard on the merits.[152] The equivalent tool in the U.S. is issued under certain requirements, that are the non-need of the discovery phase and fact-gathering due to the absence of material facts to send to the jury.[153] The comparison between the summary judgment and the 2022 new Italian provisions reveals that they both ground on a convergent

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the original purpose of the U.S. summary judgment: to promptly decide frivolous and sham claims (brought from each party indifferently).

[149] *See* Andrea Proto Pisani, *supra* note 147.

[150] See Section II.D.

[151] See, the Reform Report, *supra* note 49, at 27 specifying that "The purpose of expediting and simplifying the decision-making process is also reflected in the delegation outlined in subsection 5, specifically letters (o), (p), and (q), which aim to introduce a new instrument for resolving disputes concerning disposable rights. This instrument serves as a provisional but enforceable measure, drawing inspiration from similar provisions in the legislation of other jurisdictions. Examples include the "référé" provision in Article 809 of the French Code of Civil Procedure and the concept of summary judgment found in Article 24 of Anglo-Saxon civil procedure rules.".

[152] See Section II.D.

[153] See Rule 56 (a) FRCP

condition, despite the differences in the proceeding's structure. That is the judicial determination on the unquestioned set of facts as it emerges from the pleadings stage (including amendments), that allows a mere judgment in law on the dispute. While the issue of law is up to avoid the trial by jury within the American system, for the Italian one (and for the whole civil law legal family), the issue of law is an exclusive prerogative of the judge, based on the universally recognized principle named *iura novit curia*.[154] In both systems, therefore, the purpose of avoiding the typical ending of the lawsuit grounds on similar requirements, irrespective of the structural differences of the civil proceeding: a specific motion in the hands of both parties; the complete duty on the burden of proofs; the unquestioned set of facts emerged during the pretrial phase; and the final determination in law by the judge (for the U.S., the pretrial judge).

The qualms raised by the U.S. literature surrounding these mechanisms stimulate certain considerations related to the Americanization brought by the Reform. Wondering about Americanization also means that the Reform should refrain from repeating the drifts that emerged from domestic evaluations of some aspects of the U.S. legal system: one of these drifts is notably the criticism of the extensive use of summary judgment in practice. As Professor Miller eloquently noted:

"The 1986 trilogy usefully restates summary judgment in terms of its function and intended result, which is helpful to trial court judges in divining what they reasonably may do. And its stated goal-filtering out cases not worthy of trial-is, of course, unobjectionable. On a practical level, the three decisions collectively forge a new, stronger role for the motion. Matsushita requires that the moving party's evidence be sufficient to render the plaintiff's claim implausible. Anderson allows the trial court to enter judgment if the evidence produced by the plaintiff is not sufficient, under

[154] See recently, CARMINE PUNZI, GIUDIZIO DI FATTO E GIUDIZIO DI DIRITTO 149 (2022).

This point must be more exhaustively specified to clarify why comparison makes sense also from this perspective. Given that the requirement to enter in summary judgment upon parties' request is the evidence of no controversial material facts as the reason to justify the unnecessary trial and jury's role, the *iura novit curia* application (as it derives principally from the art. 101 Italian Constitution) as the exclusive judge's power in deciding the case means that the 2022 new provisions for a summary adjudication unavoidably ground on unquestionable facts, as emerged throughout the preliminary phase on pleadings and amendments.

the applicable standard of proof, to convince the judge that a reasonable jury could return a verdict in his favor. And Celotex has made it easier to shift the burden of adducing support for the nonmovant's legal position on a Rule 56 motion and effectively obliges the plaintiff to come forward, on the defendant's motion, with her case before trial. Stated differently, Celotex has made it easier to make the motion, and Anderson and Matsushita have increased the chances that it will be granted".[155]

The growing use of the summary judgment by courts has determined, in many cases, significant costs and remarkable delay for the parties, also due to the resources spent by the lawyer to prepare the motion and to the opposing party to reply to it.[156] This consideration is very valuable from a cross-comparative evaluation, especially in a path devoted to the Americanization of the Reform. Yet, the main critic that might be raised to the new Italian summary adjudication – in our opinion – pertains to the judge's duty to respect the right to be heard before the summary adjudication. This duty implies a sub-proceeding, established *sua sponte* by the judge, that unavoidably takes time and costs for parties, and it substantially overlaps the standard way to adjudicate the case. This consideration becomes even more compelling when one takes into account that standard adjudication could already be quick and final even prior to the Reform, thanks to existing rules that allow for a prompt resolution by the judge during the adjudicatory phase.[157]

If there is no need to proceed into discovery and fact-gathering since the set of facts is unquestionable, the Italian system already knows a quick way to go to a final and binding decision, formally structured in terms of the right to be heard, and binding in terms of *res judicata* (and constitutional

[155] *See* Arthur R. Miller, *supra* note 146, at 1041.

[156] *See* D. Brock Homby, *Summary Judgment Without Illusions,* 13 GREEN BAG 2D 273, 273 (2010), quoted in Diane P. Wood, *supra*, note 146, at 232. "The term "summary judgment" suggests a judicial process that is simple, abbreviated, and inexpensive. But the federal summary judgment process is none of those. Lawyers say it's complicated and that judges try to avoid it. Clients say it's expensive and protracted. Judges say it's tedious and time-consuming. The very name for the procedure is a near-oxymoron that creates confusion and frustrates expectations". *See also* John Bronsteen, *Against Summary Judgment,* 75 GEO. WASH. L. REV. 522, 551 (2007).

[157] Section 281 *sexies* of the Italian Civil Procedure Code that provide for an expedited adjudication.

guarantees).[158] Accordingly, despite differences between the two legal systems remain on the civil proceeding framework, one can note that similar drawbacks could be raised from theorical and practical outcomes, suggesting that Americanization should also caution the Italian reformed system to pursue an unrealistic tool in the name of a misunderstood civil justice efficiency. Moreover, the aim to balancing efficiency with finality, that should inspire every legal system, is eloquently at stake considering that orders resulted by the new summary adjudication has not the capacity of *res judicata*.

IV. CONCLUSION: VALUES, POLICIES, AND CROSS-COMPARISON.

If a purely technical comparison reveals certain similarities between the Italian civil proceedings after the Reform and the U.S. system, the discussion on the Americanization of the Italian reform implies something more than mere convergence. In our view, this "something more" entails evaluating the impact of criticisms that arise from the current state of the U.S. system. This evaluation encompasses factors such as values, policies, and potential drawbacks that may arise if the Italian system undergoes an excessive or ill-considered Americanization. For these reasons, this section aims to provide an evaluation that goes beyond the conventional comparative methodologies typically employed in international literature.[159]

It is a long-debated issue how shaping a new civil justice reform needs precisely modeling other court's jurisdictions' rules. The debate arose for two decades at least in the U.S., as properly, U.S. scholars wrote brilliant

[158] Reference is made to Section 187, first paragraph of the Italian civil procedure code that provides "when the investigating judge considers the case ready to be decided on the merits without the need to admit additional evidence, the judge remands the parties to the panel of judges", second paragraph "the judge may remand the parties to the panel of judges to have it decide on a preliminary issue on the merits of the case when the decision of this issue may define the whole case", third paragraph "the judges proceed similarly in case of issue dealing with jurisdiction or venue or in cases of other prejudicial issues; however the judge may also decide that these issues be decided when deciding on the merits of the case". For a translated version see SIMONA GROSSI & CRISTINA PAGNI, supra note 27, at 210-11].

[159] *See* Helen Herskhoff, *The Americanization of the Italian Civil Proceedings?*, at __

and thoughtful essays.[160] More generally, the idea behind this debate was if a mere transplant of foreign rules might have been granted a successful outcome in pursuing a better platform and more helpful devices, enhancing efficiency in the civil justice administration and effectiveness in issuing the fairest decision.[161]

Despite the failure of the transplant methodology, already shown in the literature in comparative law as a merely political-oriented,[162] what now makes sense is that comparative law stems from a natural way to implement reforms in civil justice looking at some specific frameworks of foreign jurisdictions, irrespective of the technicalities but focusing on the purposes and the policies that inspire the current use and interpretation of the rules.

The eloquent success of this kind of cross - comparative method might be appreciated in wondering about the Americanization of the Reform. The renewed Italian civil proceeding was not formally inspired by the American legal system of civil procedure and justice, even though the new summary adjudications orders were thought by the Italian Government expressly looking at the US summary judgment.[163] As Professor Herskhoff concludes in her article,[164] "despite not declaring U.S. inspirations by the Italian reformers, there no doubt that the reshaped structure of the civil proceeding, functionally considered, resemble some parts of the model of American civil justice regulation, to the point that it is worth comparing both systems".

Talking about the Americanization of the Italian civil proceedings reform definitively means talking about a renewed comparative approach also as an avenue to implement both systems of renewed purposes and provisions. A second step of the comparative methodology stems from this cross-examination of two different ways of structuring the civil justice administration, historically determined by different backgrounds, legal cultures, and philosophies. The cross-comparison, however, allows entering both systems to underline how the inspiration from one-to-one means recognizing the trouble of one for the other. It is not merely a matter of

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[160] *See* Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 251 (2004); Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351, 366, 377 (2002).

[161] *See generally* ALAN WATSON, *supra* note 80.

[162] See Pier Giuseppe Monateri, *The "Weak Law": Contamination and Legal Cultures (Borrowing of Legal and Political forms"),* 13 TRANSNAT'L L. & CONTEMP. PROBS., 575 (2003).

[163] See, the Reform Report, supra note 49 and supra note 151.

[164] *See* Herskhoff, *The Americanization of the Italian Civil Proceedings?* (*supra*, note 39) at__

reducing the gap between civil law and common law systems, an approach has been criticized for the irreducible difference of dissimilar systems by the comparative scholars for ages even if a periodical frame could apparently emerge.[165]

One stemming conclusion is that the balance between efficiency and finality is a widespread and shared ground that every civil justice system must face, irrespective of the different backgrounds and origins. The question raised by this article implies a multifaced answer: in terms of methodology in the comparative approach, functional and technical evaluations, and reasonable and helpful outcomes.

Idealizing a specific model of civil justice was not the declared approach of the 2022 Italian reformers: despite that, the unintentional resembling of some traits and cornerstones of the U.S legal system cautions to evaluate the Italian reform through the lens of the meaning of the Americanization. It means that Americanization has a double face: first, a general overview of the common ground of some cornerstones of the Reform as functionally oriented to an image of the American system; even technicalities can differ due to the country-specific provisions. Exemplary are the results got on role of the first hearing (the preliminary conference), along with the managerial powers of judge to the extend we can coin a new semi-adversarial model. Exemplary is also the conclusive remark that stems from the Italian new provision enhancing the judicially-led settlement, such as it seems to resolve the U.S. long-debated issue on the so-called coerced settlement, and in so pursuing a shared functionally oriented policy and value about settlement as relevant ending-type of the dispute. Secondly, but not less importantly, that cross-comparison gives us a lesson on a more critical outcome of the comparative method regarding technicalities and values' experienced evaluation. Exemplary in such a sense is the path towards Mediation and Negotiation. Despite the commonalities in terms of objectives, the path to get these objectives must take a different direction. Moreover, it is also exemplary how the criticism of the too extensive use of the U.S. summary judgment might inform and guide the Italian reformers and practitioners in limited use of the new Italian provisions regarding summary adjudications.

[165] Both by Italian and U.S. prestigious scholars like Gorla, Sacco and Gordley.