IN PRAISE OF RECONCILIATION: THE IN-COURT SETTLEMENT AS A GLOBAL OUTREACH FOR *APPROPRIATE* DISPUTE RESOLUTION

Cesare Cavallini[*] *& Stefania Cirillo*[**]

ABSTRACT

A sense of crisis in the administration of civil justice is widespread. Whether the typical difficulties faced by many countries unfold in excessive costs and delays, they have stark implications for the effectiveness of the procedural systems and access to justice. Several new institutions evolved to deal with this state of crisis. Amongst them, the judicially-led settlement, which has the peculiarity of being an alternative tool, despite being performed in the courtroom, made inroads worldwide. However, the pro-adjudication rhetoric raised and continue to raise severe qualms of parties' coercion and judicial partiality resulting from the judge's dual role as conciliator and decider. This Article deals with the matter by aiming for a triple result. First, it is intended to show how the general trend toward in-court settlement highlights the urgency of embodying a new philosophy of distributive justice in civil procedure at a global level. To this effect, rather than securing only substantive justice, the justice systems need to be devoted to dealing with cases justly, equally, and proportionally. Secondly, it will show how advocating settlement does not necessarily mean an efficiency-based claim. On the contrary, it represents a plea for "justice" by resulting in quality-oriented outcomes. Lastly, drawing from the repository of the Continental European civil procedure rules, it will sketch the proper tools to prevent the judges' promotion of settlement from flowing into an indirectly forced settlement and negatively impacting their impartiality. The relevant outcomes will show how judicially-led settlement represents, at a global level, a form of appropriate (rather than alternative) dispute resolution method.

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TABLE OF CONTENTS

[*]Professor of Law, Bocconi Law School of Milan, Cesare Cavallini has written the Introduction, Part III and the Conclusion.

[**] PhD Candidate, Bocconi Law School of Milan, Stefania Cirillo has written Part I, Part, II and Part IV. Stefania presented her Parts to the 11th Annual Global Conference of the Younger Comparativists Committee (YCC) of the American Society of Comparative Law (ASCL), held at the Northeastern University School of Law in Boston, MA, USA.

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INTRODUCTION

Over the past decades, while the traditional civil trial progressively vanished, consensual dispute resolution mechanisms, including settlement proposal made by the judge, have made several breakthroughs. As a result, the "culture of settlement" has thus now become a global procedural pattern: *i.e.*, a well-established trend in almost all projects concerning civil justice reforms in European countries, the U.S., and beyond. In the context of in-court settlement, judges are now expected to take active roles in helping the disputants reconcile, when it is deemed appropriate. For instance, pre-trial judges in the U.S. play a relevant managerial role to encourage

and facilitate settlement.[1] German, Italian, and French procedural civil codes provide mechanisms that make it mandatory for judges to put forward settlement proposals to parties or—at the very least—to promote or facilitate conciliation.[2] Even the ELI-UNIDROIT Model Rules of European Procedure explicitly provide that the Courts shall facilitate settlement at any stage of the proceedings.[3] The reason this form of dispute resolution is at the very core of most legislative reforms is because the belief that it is an efficiency-enhancing device and, therefore, should serve as a virtuous technical solution against the backlog of the machinery of justice.

Nonetheless, many Authors claim that this culture of settlement, by consisting of a sort of ending of adjudication, risks undermining the foundations on which the civil process is based, ultimately resulting in a denial of justice.[4] A common fear is that in-court settlements can encourage agreements beyond and sometimes against the actual will of the parties, and consequently contract-based conceptions of justice threaten to overshadow the true public goals of the civil process.

But is this really the case? Is this emphasis on efficiency deforming civil procedure, or does it serve public goals since it allows Courts to deal with *all* cases, rather than with *only some*? Are the concerns over a settlement forced by the judge grounded in reality? This Article places the debate in a broader comparative context by attempting a triple result.

First, the worldwide trend towards settlement is revealing a procedural pattern and a new theory of justice that goes beyond Country-specific rules. The aim is to shed light on the role of settlement in terms of "distributive justice," thus showing how the justice system needs to operate so as to deal with cases equally and proportionally at a global level. The obsession with securing substantive justice has resulted in too complex, technical, slow, and expensive processes throughout the world. As a result, the justice system is almost entirely precluded from the poor, can

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1. On the trend toward managerial judging of the recent years in relation to judicial active participation in settlement discussions, see generally, Daisy Hurst Floyd, *Can the Judge Do That - The Need for a Clearer Judicial Role in Settlement*, 26 ARIZ. ST. L.J. 45 (1994). *See also*, FED. R. CIV. P. 16 (that allows judges an active involvement in each stage of litigation, also in relation to the promotion of settlement).

2. ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], § 278 (Ger.); CODICE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE], §21 (Fr.); Codice di procedura civile [C.p.c.] [Code of Civil Procedure], §185 (It.) (along with the relevant amendments brought by the 2021 Italian Reform of the civil litigation).

3. MODEL RULES OF EUROPEAN PRO. R. 10 (EUROPEAN L. INST. / INT'L INST. FOR THE UNIFICATION OF PRIVATE L. 2021) [hereinafter ELI-UNIDROIT MODEL RULES OF EUROPEAN PRO., ELI-UNIDROIT PROJECT, or ELI RULES], https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/200925-eli-unidroit-rules-e.pdf.

4. *See also* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984); Judith Resnik, *Symposium on Litigation Management: Failing Faith: Adjudicatory Procedure in Decline,* 53 U. CHI. L. REV. 494, 522 (1986) [hereinafter *Failing Faith*]; Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 104 (1986); 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); *see also* 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. 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) [hereinafter *The Vanishing Trial*]; Marc Galanter, *The Hundred-Year Decline of Trials and the Thirty Years War*, 57 STAN L. REV. 1255 (2005) [hereinafter *The Hundred-Year Decline*]. *See generally* Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEG. STUD. 783, 783 (2004) [hereinafter *Migrating, Morphing, and Vanishing*].

pressure a party into settling the litigation disadvantageously or even withdrawing without settlement, and in effect cannot deliver substantive justice for the majority of society. The systems or reforms favoring in-court settlement introduced a new overriding objective in the Court rules, at least for civil proceedings.

Secondly, conciliation can lead to qualitative results for the benefit of the parties and third parties (i.e., the society). The consistency of settlement with "distributive justice" goals is only one aspect of the benefits in-court settlement may provide. We want to severely refrain from the adverse effect that settlement has only distributive-enhanced benefits. This might confer the idea that it is a tool that leads to mediocre results from a qualitative point of view. On the contrary, we will try to show how settlement can lead to an outcome that is correct, just, and fair, and considers advantages of specific interests and needs of the parties differently from adjudication. Furthermore, we will examine how it can represent a public good, particularly considering its relationship with precedents.

Lastly, drawing from the repository of knowledge of the civil tradition, the comparative lens can help us understand how a judge's unchecked discretion may flow into an indirectly forced settlement. How might the procedural framework impact on the promotion of settlement? Should judges always personally hear the parties on the terms of the proposal? Should judges propose the terms of the possible agreement, or should they act only as facilitators of settlement? Should the judge involved in the settlement be the same as the one who will decide the litigation in case negotiations fail or is another judge preferable? The legislative path of the in-court settlement in Continental Europe is a valuable source to help answer these questions and to demonstrate how in-court settlement may avoid potential injuries to the litigants' constitutional guarantees surrounding a civil trial.

This Article proceeds in four parts. Part I outlines the reasons for the growth of the culture of settlement across the world, along with the rules that govern in-court settlement in certain Western countries. The aim is to highlight the main features of judicial settlement's legal framework across different countries, along with the relevant dichotomies between U.S. and civil law judicial systems. Part II is intended to delineate the main qualms presented by literature, especially in the U.S., against in-court settlement.Part III tries to rebut these qualms by focusing on the benefits of conciliation. More specifically, it will delineate how the acceptance of the promotion of the judicially-led settlement requires, first and foremost, the acceptance and the embodiment of a new procedural philosophy in judicial systems. Moreover, it will sketch the benefits of conciliation for parties and society compared to the adjudication method. Part IV aims to examine the benefits of the in-court settlement specifically. Through the comparative method, it describes how German, Italian and French systems and rules governing judicially-led settlement in those countries, might help to rebut criticisms and, thus, help to understand the tools likely to promote in-court settlement.

I. THE IN-COURT SETTLEMENT AS THE NEW PARADIGM

The amiable resolution of a dispute is widespread in several fields of human activities. In the fields of law, this phenomenon has several aspects to the extent that it may occur during a private bargain or in the course of litigation. For these

reasons, it finds its regulation in private law, civil procedure, and even public law.[5] Why is amiable resolution of a dispute between parties so widespread? Because—as an eminent Author claimed—the parties of a relationship (of any kind) are the most appropriate to understand and define the boundaries of their own relationship and, consequentially, to find the correct terms and rules that govern it.[6] Parties are, in fact, the natural repository of the historical facts of a dispute. On the contrary, a third party, such as a judge or a lawyer, usually performs an artificial reconstruction of the background of these facts. To this effect, the settlement of a dispute has been considered "the greatest occurrence of the personality of the individual in the legal system and, consequently, the greatest expression of justice."[7] With the settlement, the individual resolves legal uncertainty with an autonomous act of will and thus spontaneously realizes the overriding purpose of the legal systems, *i.e.*, to regulate uncertainty.

This Paper deals with the in-court settlement: 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.

A. The Origins and Growth of the "Culture of Settlement"

In recent years, the number of trials in many jurisdictions around the world declined[8] to the extent that literature talks about the "vanishing trial" phenomenon.[9]

5. GIUSEPPE DE STEFANO, CONTRIBUTO ALLA DOTTRINA DEL COMPONIMENTO PROCESSUALE 1–2 (1959).

6. Enrico T. Liebman, *Risoluzione convenzionale del Processo*, 1 RIVISTA DI DIRITTO PROCESSUALE CIVILE 260, 284 (1932).

7. Giuseppe Capograssi, *Intorno al Processo*, *in* RIVISTA INTERNAZIONALE DI FILOSOFIA DEL DIRITTO 271 (1938).

8. *See Civil Justice Statistics Quarterly, Oct. to Dec. 2015*, U.K. MINISTRY OF JUST., https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-october-to-december-2015 (last visited May 17, 2023). The decrease in the trial is a phenomenon that is raised primarily in adversarial countries, *id.* Adversarial countries are supposed to encourage generally settlement more than inquisitorial systems, *id.* The reason is that inquisitorial systems are structurally more inclined than adversarial systems to strive to find legal truth, *id.* On the contrary, adversarial countries accept conflict-solving goals of the process and, thus, are more inclined to settlement, *id.* In England and Wales, it seems that 3% of cases reach full adjudication, *id.* 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). Continental counties have also had a significant increase in the number of ADR used to reduce courts' congestion, *see* ROLF STÜRNER, MEDIATION IN GERMANY AND THE EUROPEAN DIRECTIVE 2008/52/EC, LA MEDIAZIONE CIVILE ALLA LUCE DELLA DRETTIVA 2008/52/CE 47 (2011) (stating that "about 25 to 30 per cent of all cases are resolved by in-court settlement agreement").

9. *See* Galanter, *The Vanishing Trial, supra* note 4, at 459; Galanter*, The Hundred-Year Decline*, *supra* note 4, at 1255; Resnik, *supra* note 4, at 783; Yeazell, *supra* note 4, at 2; ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012) (hereinafter, *The Disappearance*); 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

Even if a considerable number of cases are filed before the court, fewer cases are decided by a decision and with a full trial. On the contrary, many cases are disposed of through several mechanisms, before the judge, through summary judgment; or outside the court, through mediation, arbitration, and negotiation. In the context of these mechanisms, the relationship between courts and Alternative Dispute Resolution (ADR) processes had a significant evolution in recent years, consequently impacting the judicial role and its function. To this effect, the term "judicial dispute resolution" (JDR) has been coined to describe the expanded role of judges when they are personally engaged in settling and resolving disputes through mediation, conferencing, and use of facilitative rather than adjudicative skills.[10] The increased role of the judge in promoting in-court settlement might involve an extensive range of activities, some of which are facilitative, some of which are advisory, and some of which are determinative to allow parties to settle.

The literature regarding the reasons for the significant increase in judicially-led settlement over the last decades is extensive on both sides of the Atlantic. Even if there are differences in how the in-court settlement is enforced across Western judicial systems,[11] the reasons for its evolution are similar. Both in adversarial and in non-adversarial traditions, the strengthening of the institution at stake has been (and continues to be) strictly connected with the so-called "litigation explosion."[12] The

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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).

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

11. *See infra* Part I.B (this paragraph focused, among others, on a general overview on how in-court settlement is enforced across Western judicial systems).

12. *See* Marc Galanter, *A Settlement Judge, not a Trial Judge: Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 2 (1985) (stating that "[t]he most frequently encountered justification is the notion that settlement is necessary to protect the court from a crushing overload of cases, thus reducing backlog and delay and saving the court's limited resources for those cases most needful or deserving of its attention.") Nonetheless, the Author concluded that, at the end, the reason of the increase of judicial settlement may not be conferred just to a productive argument and it can better explain also by a functionalist argument, *id.* The functionalist argument reveals that since the body of authoritative material becomes more massive, more complex and more refined, decision-makers are both constrained and supplied with resources and opportunities for legal innovation (e.g. ADR procedure), *id. See also* Judith Resnik, *Many Doors–Closing Doors–Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. DISP. RESOL. 211, 244 (1995) ("...a major premise of one strand of ADR advocacy is that current adjudicatory procedures are simply inadequate to the task. ADR functions not so much as a good, in and of itself, but rather as a good because the system is in 'crisis' and something is needed to fix it. ADR is one of many techniques of managing this crisis, and might be on an equal footing with other proposed curative measures, such as curtailing discovery rights or controlling abusive attorneys..."); LINDA R. SINGER, SETTLING DISPUTES, CONFLICT RESOLUTION IN BUSINESS, FAMILIES, AND THE LEGAL SYSTEM 13 (1994) ("Negotiation, mediation, or arbitration promise faster results than do traditional, legal, managerial, or bureaucratic processes – and at a fraction of the cost."); Stephen Goldstein, *Giudici Manager e Giudici Conciliatori*, SAGGI DI DIRITTO STRANIERO E COMPARATO 990 (2009) ("Vi sono, invero, forti collegamenti fra giudici manager e giudici conciliatori. In primo luogo, entrambi sono pensati per accelerare il processo."); HARRY WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM IN ENGLAND AND WALES Ch. 1, para. 7(d) (1996) [hereinafter Access to Justice] ("Two other significant aims of my recommendations need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation, for example by greater use of pre-litigation disclosure and of ADR, and that of encouraging settlement, for example by introducing plaintiffs' offers to settle, and by disposing of issues so as to narrow the dispute. All these are intended to divert cases from the court

extreme growth of the court docket brings high litigation costs and delays, resulting in an inability to deliver justice. Such costs and delays severely reduced access to justice. They thus undermined the capacity of the justice system to deliver justice for all, and also to effectively do so for those who can afford access to it.[13] Moreover, unreasonable delay denudes evidence of its probative value, thus increases the possibility of adjudicative error.[14] Excessive costs can also lead to the inequality of resources between litigants,[15] thus frustrating the attempt to secure a substantively just process as well as the likelihood of achieving a substantively just result.

This state of crisis in Western countries has resulted in the strengthening of two specific aspects of civil justice. On the one hand, the massive number of claims pushed the courts to create new procedures to accommodate their needs.[16] On the other hand, docket growth has brought the emergence in some countries, or the reinforcement in others, of the managerial judging.[17] For the purpose of this article, these two aspects resulted, among others, in the evolution of in-court settlement and, thus, in a new role played by the decisionmaker in the courtroom. The following paragraph will thus sketch the evolution of the in-court settlement across certain Western countries.

B. Western Litigation Settings and European Trends in Encouraging Judicially-Led Settlement

The strategic pursuit of resolution through mobilizing the court process has become a truly global procedural pattern, i.e., a well-established institution in

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system or to ensure that those cases which do go through the court system are disposed of as rapidly as possible."); STÜRNER, *supra* note 8, at 47 ("The settlement practice contributes to a remarkable part to the relatively short time German courts need to settle a case: 6-8 months in local courts, about the same in district courts or courts of appeal"). In Italy, the 2021 reform of civil justice aims at reducing the duration time for the forty per cent by five years and to this effect, among others, it strengthens the conciliation attempt by the judge pursuant to Article 185 and Article 185 *bis* of the Italian Civil Procedure Code, *see* C.p.c., *supra* note 2.

13. *See* Frank E. A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976) (part of the materials from the Pound conference). In 1976, at the Pound Conference, a meeting of some 250 judges, lawyers, court administrators, law professors, and non-lawyers, Professor Frank Sander called for a "multi-doored" courthouse, *id.* Sander justifies his proposal in part on the argument at stake, i.e., that costs and delays undermines the access to justice, *id. See also* 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 (1991) ("In the 1960s, ADR was advanced because of its qualitative-justice reasoning, which was based on community empowerment, party participation, and access to justice."); JOHN SORABJI, ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS 9, 12 (2014) (stating that "such cost and delay renders access to the justice system the preserve of the wealthy few. It undermines the system's ability to secure justice for all members of society.").

14. ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE 11 (4th ed. 2006).

15. SINGER, *supra* note 12, at 3 ("Lengthy, complex procedures, both costly and time-consuming make the courts appear to be exclusively the province of rich, the patient, and the hearty."); SORABJI, *supra* note 13, at 12.

16. *See generally* LARRY KRAMER, REFORMING THE CIVIL JUSTICE SYSTEM 1 (1996).

17. Goldstein, *supra* note 12, at 987, –90 (stressing the parallelism between conciliatory judges and managerial judge). *See also* CPR §1.4 (Eng.) (states expressly that active case management includes ". . . e) encouraging the parties to use an alternative dispute resolution procedure if the court considers it appropriate and facilitating the use of such procedure; f) helping the parties to settle the whole or part of the case . . .").

almost all reforms of civil justice systems both in Europe and the U.S.[18] On the one hand, the globalization of the in-court settlement fits entirely in the perspective of the worldwide trend toward the harmonization of civil procedure rules.[19] For instance, the long-established distinction between the adversary proceeding, mostly ascribed to common law systems, and the inquisitorial proceeding, commonly ascribed to civil law systems, appears blurred to the extent that one can question if there is a unified semi-adversarial model.[20]

On the common law side, the U.S. 1938 Federal Rules of Civil Procedure made the pre-trial conference a feature of litigation in the federal courts of the United States.[21] The pre-trial conference has become a vehicle for the in-court settlement.[22] The legal practice defined the huge level of intervention of the judge in each case in promoting settlement.[23] Nonetheless, the formal recognition of the activist judicial participation in promoting settlement came in the 1983 amendment of Rule 16 of the Federal Rules of Civil Procedure. With this amendment, Rule 16 explicitly recognized that amongst the chief express goals of pretrial conferences is the one of "facilitating settlement," directly or through "special procedures."[24] The growing relevance of the pretrial conference is viewed as a "non-trial procedure,"[25] 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.[26]

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18. *See generally* BASIL MARKESINIS, THE GRADUAL CONVERGENCE: FOREIGN IDEAS, FOREIGN INFLUENCES, AND ENGLISH LAW ON THE EVE OF THE 21ST CENTURY (Oxford Univ. Press 1994) (comparative analysis confirms the international rise of settlement and foregrounds a certain degree of approximation or even convergence between the common law and civil law traditions in this respect.); Ugo Mattei & Luca G. Pes, *Civil Law and Common Law: Towards Convergence?, in* THE OXFORD HANDBOOK OF LAW AND POLITICS 267 (2009); UGO MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW 262–70 (7th ed. 2009).

19. Generally speaking, the idea of a "global civil procedure" concerning the procedural rules, practices, and social understandings that govern litigation and arbitration continued to find prominent discussions in both domestic and international scholarship. For a recent eloquent discussion on the matter, *see* Alyssa S. King, *Global Civil Procedure*, 62 HARV. INT'L L.J. 223 (2021) (the author sketched the notion of Global Civil Procedure. Moreover, she delineated examples of the phenomenon such as conflicts of interest rules for adjudicators, aggregation, and discovery or disclosure rules. Finally, she considered the limits of global civil procedure). *See also* Aaron D. Simowitz, *Convergence and the Circulation of Money Judgments*, 92 S. CAL. L. REV. 1031, 1031–32 (2019); John C. Coffee Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895, 1899–900 (2017); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT'L & COMP. L. REV. 1 (2011); Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 442 (2010); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 51–52 (2009); Richard L. Marcus, *Putting American Procedural Exceptionalism in a Globalized Context*, 53 AM. J. COMP. L. 709, 709–10 (2005); Linda S. Mullenix*, Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 4 (2001); Ernst C. Stiefel & James R. Maxeiner, *Civil Justice Reform in the United States- Opportunity for Learning from "Civilized" European Procedure Instead of Continued Isolation*, 42 AM. J. COMP. 147, 157 (1994).

20. *See generally* Cesare Cavallini & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards A Global Semi-Adversarial Model*, FLA. J. INT'L L. (forthcoming 2023) (for a discussion on this specific matter).

21. *See* FED. R. CIV. P. 16.

22. Galanter, *supra* note 12, at 2.

23. *See id.* at 4 (providing overview of the judicial devices commended for promoting settlement).

24. *See* FED. R. CIV. P. 16(a)(5); FED. R. CIV. P. 16(c)(2)(I).

25. Langbein, *supra* note 9, at 542.

26. *Id.*

In fact, since 98-99% of all civil cases are resolved without a trial,[27] one can say that this 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. In other words, the pre-trial conference now represents the "main event" of litigation.[28] It is worth noting that from the perspective of a civil law scholar, the peculiarity of the Rule 16 approach lies in the discretion conferred to the judge in exercising the related managerial powers. Nonetheless, the notorious discretion "standing alone" is considered one of the most exceptional aspects of the American civil justice structure, and it represents the heritage of the (pure) adversarial system in which it was originally involved.[29] Rule 16 (c) (1) provides that only, "if appropriate […] the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement." Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or by trial more efficiently and with less cost and delay than when the parties are left to their own devices.[30] Consequently, the rule now includes a role for judges in encouraging settlement, but only on a discretionary basis, leaving it up to the judicial district and individual judges to adopt a more proactive stance.

The same path occurred on the other side of the Atlantic, in another common law jurisdiction. In 1998, new Civil Procedure Rules (C.P.R.) took effect in England and Wales.[31] The rules are the result of Lord Woolf's report on litigation procedure reform.[32] This comprehensive reform aimed to improve access to justice and reduce the costs of litigation, reduce the complexity of the rules and modernize terminology, and remove the unnecessary distinction between practice and procedure.[33] More specifically, Lord Woolf intended to change the whole approach to civil litigation from a wasteful adversarial model to one of cooperative problem-solving by encouraging settlement rather than trial of disputes through reliance on case management.[34] To this effect, Lord Woolf proposed that the use of ADR should be compulsory, resisting the import of the discretionary U.S. approach on the matter.[35] The 1998 Civil Procedure Rules [36] expressly recognize that active case management includes: [...] "e) encouraging the parties to use an alternative dispute resolution procedure if the court considers it appropriate and facilitating the use of such procedure; f) helping the parties to settle the whole or part of the case [...]."[37] In Part III.A

27. *See* sources cited *supra* note 4.

28. Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1589 (2003); *see also* Ellen E. Deason, *Beyond "Managerial" Judges: Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 74, 79 (2017).

29. Shapiro, *supra* note 4, at 1973.

30. STEVEN FLANDERS, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 17 (1977).

31. *See The Civil Procedure Rules 1998*, LEGISLATION.GOV.UK, https://www.legislation.gov.uk/uksi/1998/3132/contents (last visited May 18, 2023).

32. *See* ACCESS TO JUSTICE, *supra* note 12.

33. LORD WOOLF, THE PURSUIT OF JUSTICE 311 (2008).

34. TONY ALLEN, MEDIATION LAW AND CIVIL PRACTICE 72 (2019).

35. *Id.*

36. It is worth noting that the English C.P.R. have been amended more than 90 times since they were implemented in 1999 and the most fundamental modification has been made by the Civil Procedure (Amendment) Rules 2013, thought the introduction of the Jackson LJ's proposal.

37. CPR [Civil Procedure Rules] § 1.4(2) (Eng.).

we will show how the great relevance of the Lord Woolf Reform is strictly connected to the new overriding goal that it intended to give to the civil justice. Since in-court settlement played a key role in purposing this new approach, the Lord Woolf Reform stressed its promotion.

On the civil law side, the judges' managerial power in encouraging settlement is commonly an accepted aspect of the civil proceeding.[38] Article 278 of the German Civil Procedure Code (Z.P.O) provides that the court "*is* to act in the interests of arriving at an amicable resolution of the legal dispute or of the individual points at issue."[39](emphasis added). In order to arrive at an amiable resolution, the judge is to schedule a specific "conciliation hearing" (*Gütetermin* o *Güteverhandlung*) before the first hearing, unless efforts to come to an agreement have already been made before an alternative dispute-resolution entity, or unless the conciliation hearing does not hold out any prospects of success.[40] In the conciliation hearing, the parties shall be ordered to appear in person,[41] and the judge is to discuss with them the circumstances and facts as well as the status of the dispute thus far, assessing all circumstances without any restrictions and asking questions wherever required.[42] Moreover, the judge might opt to refer the parties to a judge delegated for the amiable resolution of the dispute (the conciliation judge: Güterichter), who is not authorized to make a binding decision.[43] Regarding the methods for gaining conciliation, the parties may submit to the court a suggestion, in writing, on how to settle the matter, or the court may suggest in writing to the parties a proposal that they can accept.[44] An attempt for amiable dispute resolution might also be tried during other phases of the proceeding, specifically following the presentation of evidence.[45] There is undoubtedly no obligation for the parties to reach an agreement. However, there are some incentives in terms of legal fees for parties' participation in the bargaining process. For instance, in some countries, like Italy, if a party did not participate in the hearing for the settlement discussion, the judge might consider this behavior negatively when she defines the legal fees with the final decision by bearing more fees on this party.[46] The active role of the judge in the in-court settlement is not only grounded in efficiency-related purposes. The *ratio* of this activism lies in the fact that the in-court settlement is considered a tool for achieving the fairest solution for those disputes that, if adjudicated, would not find a fully satisfactory solution for the parties. German judges have been described as playing the role of a bureaucratic *pater familias* engaged in encouraging resolution in a free-ranging conference-type hearing with active involvement of the parties.[47]

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38. Goldstein*, supra* note 12, at 990. *See generally* Cesare Cavallini & Antonio Carratta, *Judicial Settlement e modelli di tutela a confronto*, 2 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 427 (2022).

39. *See* ZPO § 278.1 (Ger.).

40. *Id.* § 278.2.

41. *See id.* § 278.3.

42. *See id.* § 278.2.

43. *See id.* § 278.5.

44. *See id.* § 278.6.

45. *See* ZPO § 492.3.

46. It. L. No. 206/2021, Section 1, para. 5, letter l and Legislative Decree No. 149/2022, Section 3, para. 13, letter g. (2022)

47. Benjamin Kaplan et al., *Phases of German Civil Procedure II*, 71 HARV. L. REV. 1443, 1471–72 (1957).

A similar approach toward in-court settlement is followed in France. The French Civil Procedure Code expressly states that the attempt to conciliate parties is part of the mandate of the judge.[48] As in Germany, with the consent of the parties, the judge may appoint a third person who will hear them and confront their points of view to help them resolve the dispute (the so-called "*mediation judiciaire*").[49] Nonetheless, with the *mediation judiciaire*, the judge still has control of the proceeding. The judge may, at any time, put an end to the *mediation judiciaire* on its own motion or upon the parties' or mediator's request if the good progress of the mediation appears compromised.[50] The line between the adjudicatory and the judicial resolution functions seems very fine. The courtroom appears to be not only the place when a function of the state is empowered, but also the seat where relationships in the society are reconstrued.[51] Consequently, the French legislator's choices regarding in-court settlement outline a justice system that changes its function towards a model of pluralist justice.[52]

The 2021 Reform of the Italian civil procedure code[53] confirms the trend toward in-court settlement. Article 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 the possibility of conciliation. 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 regarding the nature and the value of the dispute, and only if the subject of the lawsuit allows easy and prompt legal solutions. The 2021 Reform enhanced the in-court settlement in two aspects. Firstly, it provides that the parties must personally participate in the first hearing in order to allow the judge to attempt conciliation. The judge may infer circumstantial evidence by the party's nonappearance.[54] With this amendment, the Italian legislator made the judge's conciliation attempt compulsory.[55] Secondly, it allows judges to make this proposal until the final phase of the litigation, when she refers the case to the panel of judges for the decision.[56]

48. C.P.C. § 21 (Fr.) (Il entre dans la mission du juge de concilier les parties); C.P.C. § 49 art. 131-1.

49. *Id.* § 131-1.

50. *Id.* § 131-10.

51. Antoine Garapon, *Qu'est-ce que la médiation au juste?*, *in* LA MÉDIATION: UN MODE ALTERNATIF DE RÉSOLUTION DES CONFLITS? 214 (1992); Jean Carbonnier, *Réflexion sur la médiation*, *in* LA MÉDIATION: UN MODE ALTERNATIF DE RÉSOLUTION DES CONFLITS 11 (1992); C. Chabaut-Marx, *A propos de la médiation familiale: vers une judiciarisation du dialogue?*, RECUEIL DALLOZ 43 (2012).

52. Francois Ruellan, *Les modes alternatifs de resolution des conflits: pour une justice plurielle dans le respect du droit*, SEMAINE JURIDIQUE 135 (1999).

53. It. L. No. 206/2021. With the Law passed on November 25, 2021, number 206 (and the relative Legislative Decree No. 149/2022) Italy made an extensive reform on the civil justice system in order to conform itself to the compelling NRRP (National Recovery and Resilience Plan), requested by the EU and drafted by the Italian government for obtaining EU funds for responding to the pandemic crisis, *id.* One of the main strategic tools of the NRRP was properly the reform of civil justice, *id.*

54. It. L. No. 206/2021, Section 1, para. 5, letter i., No. 1. (2021) and Legislative Decree No. 149/2022, Section 3, para. 13, letter g. (2022).

55. Cesare Cavallini, LEZIONI DI DIRITTO PROCESSUALE CIVILE, 503 (2022). Please note that the compulsory conciliation attempt had a troubled path, *id.* 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 hearing was repealed because it was been considered unsuccessful, *id.* However, in order to enhance the ADR mechanism, the 2021 Reform reintroduced it, *id.*

56. It. L. No. 206/2021, Section 1, para. 5, letter. m. and Legislative Decree No. 149/2022, Section 3, para. 13, letter b. (2022).

Moreover, the judge might also refer the parties to a mediator if particular conditions are met and the possibilities of conciliation are high (i.e., the delegated or *ope iudicis* mediation).[57] The Reform also reinforced the delegated mediation with different measures, for instance, by establishing training courses for judges.[58] The scope is to consider this institution not as merely ancillary to the trial but complementary to the jurisdiction.[59]

The general trend made in Continental Europe towards in-court settlement is also firmly embraced at the EU level by the ELI-UNIDROIT Model Rules of European Procedure (hereinafter, the ELI rules).[60] In this respect, Rule 10 of the ELI rules sketches the model of the most appropriate regulation that should govern the in-court settlement. At a general level, Rule 10 of the ELI rules demonstrates a clear favor for the institution at stake, by providing that, generally speaking, the "court must facilitate settlement at any stage of the proceedings."[61] In this respect, on the one hand, it highlights particularly that the court must ensure that the parties consider settlement in the preparatory stage of proceedings and at case management conferences. On the other hand, it stresses how the court may order the parties to appear in person if necessary to facilitate settlement.[62] Moreover, according to the model rule, the court has to provide the parties with information concerning available settlement methods.[63] It might also suggest using specific consensual dispute resolution methods,[64] in addition to the same obligation imposed on lawyers. In this respect, the comment provided by the ELI Rules forewarns the possibility of conflict between the consensual dispute resolution methods suggested by the court and by the parties' lawyers. Accordingly, it states that in such a case, "[T]he judge should be careful not to come between party and lawyer, so as to avoid giving the perception of bias such as to result in their being disqualified from continued involvement in the proceedings. Judicial pressure to settle must be avoided, and Rule 10(2) must be read accordingly."[65] In other words, the court must always show that it is a party's right (not a party's obligation) to settle the dispute. On the methods for reaching conciliation, the ELI rules provide a broad spectrum of court powers: from the power of merely assisting the parties in reaching a consensual resolution to the possibility of drafting the settlement agreements.[66] Within this approach, the ELI project confirms the trend toward judicial involvement in settlement endeavors while providing discretion as to how best to achieve this to the particular circumstances, and by respecting the traditional approach of each European jurisdiction on the matter.[67] Another interesting aspect of the ELI Rules pertains to the limits provided to the conciliation activity of the judge in order to avoid conflicts between the adjudicative function and that of facilitating settlement. To this effect, when a judge

57. *Id.* at Section. 5, para. 2 (the Law that regulates the Mediation and Negotiation procedures).
58. It. L. No. 206/2021, Section 1, para. 4, lett. o. and Legislative Decree No. 149/2022, Section 7, para. 1, letter e. (2022).
59. CAVALLINI, *supra* note 55, at 499.
60. ELI-UNIDROIT MODEL RULES OF EUROPEAN PRO., *supra* note 3.
61. *See id.* § 10(1).
62. *See id.*
63. *See id.* § 10(2).
64. *See id.*
65. *Id.* §10 cmt. 2.
66. ELI-UNIDROIT MODEL RULES OF EUROPEAN PRO., *supra* note 3, § 10(3).
67. *See id.* § 10 cmt. 3.

mediates during a settlement process and receives information in the absence of one of the parties, that judge must not decide the case.[68] Under this rule, the impartiality and independence of the judge will never be undermined by a private involvement in the conciliation process.

II. ARGUMENTS AGAINST IN-COURT SETTLEMENT

The peculiarity of the in-court settlement is that contrary to other mechanisms that promote agreement instead of adjudication, judges continue to be extremely significant and crucial for the outcome of the litigation.[69] Integrating an ADR mechanism in the courtroom, in the seat historically devoted to adjudication, raises challenges and questions. Along with the extraordinary success and conforming power of this new culture of civil process, the field of anti-adjudication literature also began to grow. Thus, the global proliferation of a model of civil process enhancing the settlement has been considered problematic, especially in the U.S.[70] The main reason behind these qualms, as we will discuss in the following pages, pertains to the risk that a model promoting settlement, by denying adjudication, might turn justice into merely a potential—and external—end of civil justice, and in so doing eroding the axiological foundations on which the architecture of the civil process should be based. Below we try to sketch the main arguments against settlement.

A. The Negative Impact on the Judge's Role and Parties' Choices

There is extensive literature from the U.S. regarding the risks of judicially-led settlement.[71] The main hesitation of the "against settlement" rhetoric lies in the potential for coercion, *i.e.*, the threat for parties and attorneys to be coerced into a settlement.

There are several arguments for the coerced settlement. One argument consists of the potential impact that directive powers of the settlement judge might have on the parties' choice to settle. This argument rests in the notion that in case negotiations fail, the same judge to oversee negotiations will adjudicate the case. The authority of the judge, especially if misusing that authority, can force parties to settle since they might fear that refusal could have a negative impact on the final decision.[72] The potential for coercion, in this case, is elevated when the judge directly makes a settlement proposal.

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68. *See id.* § 10(4).

69. Michal Alberstein & Nourit Zimerman, *Judicial Conflict Resolution in Italy, Israel and England and Wales: A Comparative Analysis of the Regulation of Judges' Settlement Activities*, *in* COMPARATIVE DISPUTE RESOLUTION 298, 298 (Maria Federica Moscati ed., 2020).

70. *See generally* sources cited *supra* notes 4, 9 (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).

71. *See, e.g.*, Fiss, *supra* note 4, at 1073; Resnik, *Failing Faith*, *supra* note 4, at 494; Coleman & Silver, *supra* note 4, at 103; Shapiro, *supra* note 4, at 1969; Alfini, *supra* note 4, at 11; Resnik, *Migrating, Morphing, and Vanishing*, *supra* note 4, at 783; Yeazell, *supra* note 4, at 943; Galanter, *The Vanishing Trial, supra* note 4, at 459; Galanter, *The Hundred-Year* Decline, *supra* note 4, at 1255.

72. 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*

Another familiar argument pertains to the parties' inequality of resources. This shortcoming is often ascribed to almost every ADR method.[73] More specifically, since the parties usually have unequal bargaining power, encouraging settlement may coerce the weaker party to accept an unfair deal.[74] Owen Fiss, who stresses this view, stated how "an indigent plaintiff may be exploited by a rich defendant because his need is so great that the defendant can force him to accept a sum that is less than the ordinary present value of the judgment."[75] Moreover, "the poorer party might be forced to settle because he does not have the resources to finance the litigation."[76] For these reasons, settlement practices are considered procedures that do not reflect substantive justice.

A massive criticism of the judges' role in settlement pertains to their independence. The danger has been traditionally framed as one of bias or partiality.[77] To this effect, the involvement in settlement makes it difficult for a judge to maintain their neutrality about the case. The decision overseen by the judge may be influenced by the opinions or impressions that she naturally develops during the settlement.[78]

Therefore, a high degree of judicial involvement in a settlement may lead to an unintentionally biased decision.[79] Regarding U.S. case-law, the risk for bias in settlement has been alleged in cases,[80] where parties required the disqualification of the judge or to reverse the court's decision due to judicial misconduct, and in particular, for depriving the parties due process of law due to an undue amount of involvement of the judge in the settlement process during the trial. The same has occurred in actions dealing with judicial comments or actions during settlement discussions by the judge during the pre-trial.[81] However, as it can be inferred by these U.S. cases, to obtain a disqualification or a reversal, the biased conduct would have to stem from extrajudicial sources, i.e., a source not derived from the evidence or

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Faith, *supra* note 4, 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* Alfini, *supra* note 4, 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.").

73. *See generally* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution,* 1985 WIS. L. REV. 1359 (1985) (dealing with the matter and focusing especially on what might foster racial or ethnic bias in dispute resolution).

74. *See, e.g.*, Fiss, *supra* note 4, 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); Coleman & Silver, *supra* note 4, 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.").

75. *E.g.*, Fiss, *supra* note 4, at 1076.

76. *Id.* at 1076.

77. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 426– 31 (1982).

78. Alfini, *supra* note 4, at 13 ("[A] judge may find difficult to satisfy the dictates of the adjudicatory role (which stress rendering a decision based solely on the evidence offered at trial) if the judge has previously (unsuccessfully) intervened in the case in an attempt to affect settlement. The judge *qua* settlement agent may very well have formed opinions or impressions about the case that are inappropriate for the judge *qua* adjudicator.").

79. Floyd, *supra* note 1, at 90.

80. *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986).

81. *See, e.g.*, Pau v. Yosemite Park, 928 F.2d 880, 885 (9th Cir. 1991); Franks v. Nimmo, 796 F.2d 1230, 1235 (10th Cir. 1986).

conduct of the parties that the judge observes in the course of the proceedings.[82] The judge's unintentional bias, which is the primary fear in relation to their independence, pertains to judges that make up their minds prematurely about a case during the settlement bargain and that may affect the judges' conduct in the adjudication.[83] This unintentional bias may present significant risk because, since it does not fill the extrajudicial source requirement, it does not allow disqualification or a reversal.

B. Qualms on the Structure of the Proceeding and the Qualitative Results

Another argument pertains to the structure of the proceeding. The absence of a public hearing on the settlement negotiations may increase the likelihood of a judge's prejudicial behaviors.[84] One aspect of this qualm is that the judge's encouragement of settlement is conducted mainly in chambers and without a court reporter, and as such, there is rarely a record of the exact path and methods by which a judge encouraged a particular settlement.[85] Decisions and actions held in judge's chambers rather than on the record in open court are unreviewable even in the forum of public opinion.[86] Comprehensive research of judicial participation in negotiations, even if related more to criminal cases, describes why judges continue to conduct settlement hearings off the record in chambers.[87] In certain cases, the location for conducting the bargain appears to be just judicial preference, not a set practice.[88] In others, private meetings are preferred by lawyers because they permit a freer discussion regarding sensitive issues.[89]

Additionally, judges might also take the role of an intermediary and have conversations with the parties separately. These intermediatory roles allow judges to receive information unfiltered by the rules of evidence.[90] In these cases, parties may develop a sense of fear regarding judge's partiality if they do not know the subject of conversations that judge may be having with opposing counsel. Given this fear, a party might avoid considering any type of proposal for settlement if she considers the process violated. She may also avoid sharing information for the risk that it might have a negative impact on future settlement processes.[91] Or, she may feel

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82. U.S. courts have consistently held that the bias required under 28 U.S.C. § 455(a)–(b) is the bias that derived from an extrajudicial source. For cases involving disqualification, see United States v. Grinnell Corp., 384 U.S. 563, 583 (1966); Fong v. American Airlines, Inc., 431 F. Supp. 1334 (N.D. Cal. 1977); Johnson v. Trueblood, 629 F.2d 287, 291 (3d Cir. 1980). For cases involving reversal, see Hansen v. Commissioner, 820 F.2d 1464, 1467 (9th Cir. 1987); In re Corey, 892 F.2d 829, 838–39 (9th Cir. 1989). For a general overview on the extrajudicial source doctrine, see Douglas R. Richmond, *Judicial Impartiality and the Extrajudicial Divide*, 2022 UNIV. ILL. L. REV. 1539 (2022).

83. Floyd, *supra* note 1, at 84.

84. Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear*, 17 HARV. NEGOT. L. REV. 97, 99 (2012).

85. *Id*.

86. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 676 (1994).

87. Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 341 (2016).

88. *Id.*

89. *Id.* at 342.

90. Resnik, *supra* note 77, at 427.

91. Deason, *supra* note 28, at 118.

coerced to settlement for the risk of adverse consequences on her position in the final decision.

Another argument against settlement deals mainly with the risk that a high settlement rate might produce too few opinions and precedents, which are public goods.[92] While the original litigants of a dispute "purchase" the rules that are held by a final decision, future litigants use these rules without paying.[93] For instance, the judge may use this rule as a precedent to solve the case more quickly and at a lower cost. Parties may use this rule as well to prevent a potential new dispute that might rise between them. In other words, since precedents (and the relevant opinions) affect subsequent decisions and influence private economic behavior,[94] they are considered positive externalities or public goods that promote efficient results. Consequently, voluntary settlements fail to give the same external and public benefits of precedent and therefore negatively impact the justice system.[95] A high degree of settlement rates may hurt the public purpose of precedents and legal rules. Moreover, since precedents are a source of legal rules their public benefit regarding the quality of justice may also be appreciated.[96] Consequently, since the parties' agreement substitutes the judgment of a court or jury on the fundamental question, the quality of justice may be seriously undermined. The implied (and debatable) consideration beyond this argument focusing on the quality of the system, even if not clearly expressed, is that trials are more "just" or "fair" than a private resolution of a dispute by definition.[97]

III. SETTLEMENT AND ADJUDICATION: COMPLEMENTARY RATHER THAN ALTERNATIVE

We will demonstrate in Part IV how the tools of civil law procedure may positively impact the in-court settlement and the relevant qualms. However, we believe these tools may function only if the jurisdictions encouraging the settlement first recognize the development of a new philosophy of procedure and, thus, a new overriding subject of the judicial systems. Moreover, the general trend towards the

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92. William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Em See generally* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (expressing how our court system produces rules that are valuable to nonparties in their future planning).

93. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995) ("The Landes/Posner/Coleman/Silver analysis shows that precedents and legal rules are public goods. Although the original litigants of the cases "purchase" the rules, future litigants use these rules without paying").

94. Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 2 (2000).

95. *Id.*

96. *See* Fiss, *supra* note 4, at 1085 ("A settlement will thereby deprive a court of the occasion, and perhaps even the ability, to render an interpretation."); Coleman & Silver, *supra* note 4, at 114 ("The reason is that trials often produce opinions and precedents – public goods – that benefit not only the parties to a lawsuit, but third parties as well."). *See also* ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 15 (2017) ("[I]f important cases are not being tried, this is a serious problem because this means society loses opportunities to engage in arguments and deliberation over the application of law."); Galanter, *The Vanishing Trial*, *supra* note 4, at 528 ("[T]he absence of an authoritative determination of facts transforms adjudication into a spiral of attribution in which supposedly autonomous decisionmakers take cues from other actors who purport to be mirroring the decisions of the former.").

97. Miller, *supra* note 74, at 22.

institutions that, like in-court settlement, promote conciliations, should be supported by the analysis focusing on the relevant benefits for litigants and society. In this Section, we will first delineate the new philosophy that needs to be accepted (and seems to be accepted) in the reforms that promote settlement. Shortly after, we will sketch the advantages generally led by the conciliative methods.

A. Theories of Justice: Towards a New Global Overriding Subject of the Judicial System

The traditional trial has been revealed to be an inappropriate tool for facing new social needs. Problems of complexity, costs, and delay of the litigation have rendered judicial systems across the world unable to deliver justice.[98] In other words, these problems have undermined the judicial system's ability to secure substantive justice, meaning to secure enforcement of substantive law through ascertaining the truth of facts and correctly applying the law to them, thus, issuing an accurate decision.[99] Due to the new social needs, substantive justice, as the primary policy aim of each procedural system, has had to face up to other policy aims, like procedural economy and efficiency.[100] Is the emphasis on efficiency really deforming civil procedure and overshadowing the public goals of the civil process?

Efficiency goals has always been regarded as the opposite of substantive justice goals. In other words, the economic grounds that justify specific rules or reforms are often regarded as just a matter of money and time. Efficient reforms pursued results that are considered different (and sometimes opposite) of what "substantive justice" reforms are apt to get, that is to vindicate rights fairly and by a due process.

However, one can quickly note that a final judicial decision issued many years after the submission of the lawsuit, at a disproportionate cost, represents a form of denied justice. For instance, the delay may induce error by allowing evidence to disappear or deteriorate; consequently, it is strictly related to the rectitude of the decision.[101] In the same way, time may erode the utility of a judgment, regardless of its correctness.[102] This means that the procedural system needs to incorporate a

98. *See* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729 (1906) ("Dissatisfaction with the administration of justice is as old as law."). *See generally* Vincenzo Vigoriti, *Il rifiuto del processo civile*, NUOVA GIURISPRUDENZA CIVILE E COMMERCIALE 237 (1999); ADRIAN ZUCKERMAN, CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE 12 (1999); Paolo Biavati, *Conciliazione strutturata e politiche della giustizia*, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 785 (2005).

99. Zuckerman, *supra* note 14 at 3 (underlining how justice has several dimensions by which it may be measured and one of them is the truth, and stating that "in all systems of procedure doing justice means arriving at decisions which give the partiers before the court what is legally due to them. In order to do justice, then, the court has to determine the true facts and then correctly apply the law to them."); VAN RHEE & UZELAC, *supra* note 9, at 3 ("In the pursuit of justice, truth always plays a prominent role.").

100. ZUCKERMAN, *supra* note 14 at 6 ("There are further dimensions of justice which, while having no direct bearing on rectitude of decision, have a powerful influence on both the justice of the system and on individual outcomes. These are time and cost"); VAN RHEE & UZELAC, *supra* note 9, at 7 (stating that "if a proper balance between truth and the necessary time and resources cannot be found, the whole process of litigation may be endangered.").

101. ZUCKERMAN, *supra* note 14, at 6.

102. *Id.*

new condition to deal with cases justly: proportionality.[103] Thus, a case can be considered disproportionate where the disutility cost (in terms of money and time) of achieving it outweighs its utility value.

Moreover, high, disproportionate, and unpredictable costs and delays frustrate not only the possibility of securing substantive justice effectively for the majority of society but also access to justice. All litigants do not have adequate and equal opportunity to state their case and answer their opponents; consequently, courts are basically closed to the poor. Thus, the procedural system needs to incorporate another condition to deal with cases justly: equal access to justice.[104] In other terms, the inefficiency of a procedural system brings ineffectiveness and inequality shortcomings.

For these reasons, across the world, procedural systems have to deal with the need to secure a fair distribution of justice through society by maximizing its production rather than only securing substantive justice in each case.[105] In other words, a system should function by having, amongst its scopes, the need to secure distributive justice, meaning the scope to maximize the general welfare. This means that the procedural system should be designed and operated with three policy aims: (i) a commitment to achieve substantive justice; (ii) a commitment to secure substantive justice at no more than necessary (i.e., minimum) litigation cost and delay; (iii) a commitment to ensuring the frustration of substantive justice in order to maximize the general welfare (i.e., to secure distributive justice).[106] In doing so, the procedural system can legitimately deny substantive justice's achievement to further the third and new policy aim. To use the principle clearly encapsulated in rule 1 of the

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103. *See* SORABJI, *supra* note 13, 104–05; *see also* VAN RHEE & UZELAC, *supra* note 99, at 7 (stating that "[a]s with most things in life, truth has its price, and this price should, according to many, be proportionate to the social importance of the case."). Proportionality is not a new concept, *supra*. It has (i) underpinned European Union law since 1956; (ii) been a feature of private law for far longer than that, (iii) also underpinned, for instance, the existence of England's hierarchical court structure, (iv) from a wider perspective, since 1983 rule 26 of the US Federal Rules of Civil Procedure has included the express requirement that discovery should be no more than proportionate, *supra*.

104. Zuckerman, *supra* note 98, at 9 (observing that "it is not enough that a system tries to achieve rectitude of decision, it must also enable those who wish to enforce or defend their rights a reasonable opportunity to do so. A system which, for example, denies certain sections of the community the opportunity to enforce or defend their rights in the courts deprives these sections of justice. Access to justice is, therefore, a fundamental civic or constitutional right recognized by all civilized societies."); *see also* ALEXANDRE BIARD, JOS HOEVENAARS, XANDRA KRAMER & ERLIS THEMELI, NEW PATHWAYS TO CIVIL JUSTICE IN EUROPE: CHALLENGES OF ACCESS TO JUSTICE 1 (2021) (stating that "old hurdles – including costs and delays – continue to challenge access to justice.").

105. *See* Jeremy Bentham, *Principles of Judicial Procedure, with the outlines of a Procedure Code*, *in* JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM (1843); *see also* WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW (1966); GERALD J. POSTEMA, BENTHAM AND THE COMMON LAW WORLD (1986). This is in line with Bentham's theory of justice, *supra*. The idea developed from Bentham shows how a theory of justice can take as its predominant policy aim the achievement of something other than substantive justice, and in doing so it can legitimately deny substantive justice's achievement in order to further that new policy aim, *supra*. In contrast with equity-based theory, Bentham theory of justice has its substantive policy aim in the maximization of general welfare or happiness: the so-called principle of utility, *supra*. This means that a system should be concerned more to secure a fair distribution of utility across society by maximizing justice production, rather than to secure substantive justice in an individual case, *supra*.

106. *See* SORABJI, *supra* note 13, at 75–76; *see also* VAN RHEE & UZELAC, *supra* note 99, at 7 (stating that "In more and more jurisdictions, the truth in civil litigation is not an absolute goal anymore.").

English Civil Procedure Rules by 1996 Lord Woolf Reform,[107] rather than seeking to secure substantive justice, the justice system has to operate so as "to deal with cases justly and at proportionate cost." This imperative means that each system should function by balancing several principles other than substantive justices. These principles are mainly proportionality and equitable access to justice, two aspects of the so-called "distributive justice."[108] Any structural reform should bear and incorporate these new challenges.

As we described in previous pages,[109] in several jurisdictions, the judicial systems changed to one that encourages the in-court settlement of the litigation. The move toward an in-court settlement for the civil process does not merely represent a change in the mechanics of litigation. It involves the development of the new philosophy of procedure to which we are referring. Thus, a system devoted to promoting in-court settlement is to give effect to more than one substantive value: substantive justice and consensual settlement in the absence of substantive justice.[110] The possibility to conclude a settlement (and thus to renounce pursuing substantive justice as an outcome of a trial) reduces the burden of costs and delay and thus, helps to get a "rationed and rational system of judicial resolution of disputes,"[111] consistent with distributive purposes. However, this does not mean a disadvantage for substantive goals of the process. By moving towards a more rationed and rational system, in-court settlement enhances the system's ability to ensure claims progress to trial, judgment on the substantive merits, and effective enforcement. Thus, it would increase substantive justice too. For these reasons, judicially-led settlement is appropriate to balance instances of substantive and distributive justice.

Now seems the appropriate time for a complete change on a global level, the need for a complete change in litigation culture and a new approach to civil justice.[112] The new approach consists of counterbalancing the substantive justice with the aspects of distributive justice. This new culture or approach to litigation should bring a new device: an explicit overriding objective in the rules of court that would express the underlying aim and philosophy of the justice system. This new overriding objective could be expressed in the following terms: in order to appropriately operate and deal with cases justly, a procedural system should be structured to be devoted to secure substantive justice at no more than necessary litigation costs and delays, and thus, to secure distributive justice at the substantive justice's expense in individual cases. Nonetheless, distributive justice helps to correctly perform substantive justice for the benefit of the judicial system as a whole. The explicit integration of this overriding objective in the scopes of the civil process would allow the clear acceptance of institutions as judicially-led settlement.

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107. CPR Section 1.1 (1) (Eng.); *see also* John A. Jolowicz, *The Woolf Reforms*, *in* JOHN A. JOLOWICZ, ON CIVIL PROCEDURE (2000); WOOLF, *supra* note 33.

108. *See* SORABJI, *supra* note 13, at 76 (providing specific reference to proportionality and equitable access to justice). *See generally* Ronald L. Cohen, *Distributive Justice: Theory and Research*, 1 SOC. JUST. RSCH. 19 (1987).

109. *See supra* Section I.A and Section I.B.

110. *See* MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 148 (1991).

111. *See* SAMUEL ISSACHAROFF, CIVIL PROCEDURE 196 (2012).

112. RICHARD L. MARCUS ET AL., A MODERN APPROACH 2 (2018) (stating that "rules of procedure reflect important policy values and that one must approach procedure with some appreciation of the objectives sought to be achieved through litigation.").

B. Justice in Settlement

Rules and reforms are unavoidably connected with politics and ideologies. Rules usually develop with the aim to interpret the general needs and social demands of society, to provide appropriate solutions to ideological and political problems. Since civil procedure is traditionally considered a technical branch of the law, its ideological foundations, philosophical background, and socio-political impacts do not quickly emerge, nor are they analyzed.[113] However, these factors are crucial, even in civil procedure, and no reform or rule is ideologically neutral:[114] "[*P*]rocedure *is, in fact, the faithful mirror of all of the major exigencies, problems, and trials of our epoch – of the immense challenge of our time*" (emphasis added).[115]

To this effect, one of the landmark pieces related to conciliation written by Owen Fiss, "Against Settlement,"[116] reflects the impact of ideology and politics on the interpretation of rules. By carefully reading Fiss' pages, one may appreciate how his strong allegiance to adjudication should be read in light of the years when this article was first published.[117] Writing in the late 1970s and early 1980s, he espoused that adjudication could protect famous commitments to the U.S. welfare state. These commitments hinged on the redistributive capacities of an active state. This social political trend strongly believed that the state should assume the primary responsibility for social well-being, and thus to control the primary functions for providing financial and social needs as the function of adjudication.[118] In contrast, ADR—by glorifying individual interest maximization rather than collective social justice—seemed to support the nascent trend toward privatization of state

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113. Mauro Cappelletti, *Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847, 881 (1971).

114. *See* PIERO CALAMANDREI, PROCEDURE AND DEMOCRACY 76 (1956) ("the judicial process reflects the ... structure of the state, just as a drop of water reflects the sky*"); see also* FRANZ KLEIN, ZEIT- UND GEISTESSTRÖMUNGEN IM PROZESSE 8 (1958) (stating that "the squalid, arid, neglected phenomenon of civil procedure is in fact strictly connected with the great intellectual movements of peoples; and that its varied manifestations are among the most important documents of mankind's culture"). *See also* Cappelletti*, supra* note 113, at 882 (providing an example of the so-called "formal" or "legal" system of proof, which was into force in the *jus commune* era). According to this system, the evaluation of the evidence was mathematically established by law, *id.* More specifically, the search of the truth of facts did not occur on concrete observation and empirical evaluation of facts case-by-case, but on abstract and absolute premises in a mechanical way, *id.* For instance, the testimony of women was either inadmissible or counted only as one-half of the evidence and had to be supplemented by the testimony of at least one man; the nobleman's testimony was valued more than that of the commoner; the clergyman's testimony valued more than that of the layman; the rich's testimony valued more than that of the poor; the Christian's testimony valued more than that of the Jew, *id.* This system reflected on the one hand, a hierarch and non-egalitarian society based on the superiority of the nobleman, the clergyman, and the rich over the commoner, the layman, and the poor, *id.* On the other hand, it represented an *a priori* and scholastic (and thus not scientific) method of thinking.), *id.*

115. Cappelletti, *supra* note 113, at 886.

116. Fiss, *supra* note 4.

117. Amy J. Cohen, *Revisiting against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1145, 1168 (2009).

118. This political trend can usefully be represented by two highly influential works: HAROLD WILENSKY, THE WELFARE STATE AND EQUALITY (1975) (emphasizing the determining role of impersonal economic forces); GOSTA ESPING-ANDERSEN, THE THREE WORLDS OF WELFARE CAPITALISM (1990) (where politics and political institutions play the leading role).

functions.[119] Nonetheless, an extremely ideologically-related approach such as this could result in a misrepresentation of the rules and the relevant institutions. It also risks being too removed from reality. For instance, how might we elevate adjudication as an absolute value in contexts lacking supranational judicial bodies (like third world states), in developing states with weak courts, or—as said in the previous paragraph—if it results in courts that are closed to the poor, even in more developed countries?

In the previous paragraph, we tried to demonstrate how conciliation is apt to lead to the new overriding subject that the process pursues (or should pursue). However, we aim to reduce suspicions that the new distributive goals justify mediocre or poor results compared to the adjudication's outcome. This paragraph is oriented to this effort by moving in two directions. On the one hand, we will explain why the settlement is oriented towards "fair" and "just" results, and thus represents a benefit for the parties. On the other hand, we will delineate that it does not undermine the value of precedent; on the contrary, it stands to serve the creation of "good" precedents. In that way, settlement represents a benefit for third parties (society).

We are conscious that any approach, mainly when the writer analyzes rules regarding moral ideals like justice and fairness, could inevitably suggest an underlying ideology. However, the primary strain of these pages is to deal with the values of justice and fairness by employing those values that the settlement adversaries use to contest conciliation-oriented reforms. This approach helps to release conciliation from political and ideological influences, and thus it tries to be as technical as possible.

(i) The quality of the results for the parties

The concern about the quality of the conciliation's outcome in terms of justice and fairness inferred a broader issue: the relationship between conciliation and adjudication. Are conciliation and adjudication two heterogeneous *phenomena*? Are they directed to purposes that are, if not opposite, at least different? Or do they both underlie a common purpose?

The question depends on the fact that many authors considered the tension towards justice as the discriminating factor between conciliation and adjudication. In other words, they considered that only adjudication could lead to justice, *i.e.*, to a fair result. In contrast, settlement is only aimed at a mere resolution of two opposing interests, and it does not yield a fair result for the parties.[120]

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119. ESPING-ANDERSEN, *supra* note 118, at 1147. *See also* Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 L. & HUM. BEHAV. 121 (1982) (highlighting the author's association of dispute resolution with the public policies of the Reagan era, which promoted markets as a solution to many social problems and considered the state as primarily a watchdog of efficient market exchange). On the contrary, he sustained that adjudication is able to constrain these new policies and practices, *id.* In his view, adjudication differed from settlement in three crucial aspects, *id.* First, adjudication is based on social justice, rather than on individual consent, *id.* Second, it reflects the social principles of the welfare state rather than those of the "night-watchman state,"*id.* Third, and for these two aspects, it reinforces public rather than private values, *id.*

120. Fiss, *supra* note 4, at 1085 (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

Nonetheless, the possibility of equating the settlement's outcome with that resulting from adjudication must not surprise the reader. Consider that under Roman law,[121] the settlement had the same *auctoritas* of the decision; similarly, the Napoleonic code[122], as well as the 1865 Italian Civil Procedure Code[123] conferred the value of *res judicata* to settlement.

The answer to the mentioned questions requires an inspection of the scope of the civil proceeding. If one admits that the civil proceeding should be aimed at the mere resolution of the conflict[124] borne between the litigants, then it is impossible to sustain that the amicable settlement of dispute brings an inappropriate result.[125] By espousing this view, adjudication and settlement are two homogeneous *phenomena*. However, this kind of analysis becomes trickier if one admits that—as we discussed in the previous section—the ultimate purpose of the trial is to provide (substantive) justice.[126] In the previous paragraph, we argued precisely that this ultimate purpose must be tempered with other and more distributive purposes. However, as said, we want to avoid creating the misconstruction that the conciliatory outcome does not produce qualitatively noticeable results, meaning that it does not itself pursue justice and fairness. Here, we will explore how settlement can serve these different aims and thus lead to appropriate results, at least as well, if not better than adjudication or, generally speaking, "judging." In other words, the "due" or "just" process does not necessarily need litigation or a lawsuit.[127]

In looking at the Italian Constitution, one can see notions of justice and jurisdiction do not coincide. The Italian Constitution uses the term "justice" to refer mainly to jurisdiction and, thus, to the trial.[128] Nonetheless, reading other rules, the

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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."); Resnik, *supra note* 4, at 552 (stating that "consent" to judgment may not, in and of itself, be a sufficient guarantee of quality, fairness, or litigant satisfaction); Coleman & Silver, *supra* note 4, at 108 (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"); s*ee also* Enrico T. Liebman, *supra* note 6, at 284 (providing the Italian doctrine).

121. Michele Antonio Fino, *L'archetipo contrattuale transattivo: radici storiche e ruolo attuale nell'ordinamento*, RIVISTA DI DIRITTO ROMANO, 1, 27–28 (2001).

122. Code civil [C. civ.] [Civil Code] § 2502 (Fr.) ("Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort"); *see also* Fino*, supra* note 121, at 34–36.

123. C.p.c. § 1772 (1865) (It.) ("Le transazioni hanno fra le parti l'autorità di una sentenza irrevocabile).

124. *See* Mirjan R. Damaska, EVIDENCE LAW ADRIFT 110 (1997).

125. DE STEFANO, *supra* note 5, at 8.

126. *See* MICHELE TARUFFO, LA SEMPLICE VERITÀ: IL GIUDICE E LA COSTRUZIONE DEI FATTI 107 (2009).

127. STUART HAMPSHIRE, JUSTICE IS CONFLICT 8 (2000).

128. COSTITUZIONE [COST.] (It.), https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf. Section 102 of the Italian Constitution provides that the "justice" is "administered

Italian Constitution does not consider the term justice as a natural and essential extension of the term jurisdiction.[129] In this regard, Section 111, paragraph 2 of the Italian Constitution regulates "due process" and thus indicates that "trial" (i.e., the process) and "justice" ("due" or "fair" results) cannot be overlapped.[130] Moreover, other signals in the Italian Constitution support social cohesion. Section 2 of the Italian Constitution provides for the fulfillment by the citizens of mandatory duties of economic, political, and also "social solidarity."[131] This means that the Constitutional legislator does not consider the individual only as the holder of "justiciable rights" (and therefore the holder of the right to request the judicial function by the courts) but also as the holder of a duty of social solidarity aimed at resolving conflicts.

The term "cohesion" is related to consent. A settlement procedure will produce an outcome that both, or all, parties have participated in crafting; in other words, settlement is based on consent. The consensus outcomes have the primary advantage of being focused on the past as well as on the future.[132] In other words, at the core of the settlement, there are terms that the parties have evaluated as correct, just, and fair to regulate and re-establish an interrupted situation (and thus to regulate the past), as the judicial decision does. But settlement is based on interests and needs rather than arguments and positions, contrary to adjudication. Interests and needs are projected to regulate the future. They do not represent only the disputed claim (and thus the past), as arguments and positions do. They represent what the parties expect from that disputing relationship and/or situation.[133] To this effect, the correctness, justice, or fairness of settlement is suitable also to re-establish peace between the parties for the future, more than adjudication.

As said, settlement is based on interests and needs rather than arguments and positions. Adjudication works in the opposite way. This means that another advantage of the settlement is that the parties, in order to get a settlement outcome, cannot only divide the available resources—as the adjudication does. Instead, they need to look for additional resources or new ideas. Such an approach is intended to

"in the name of the people, and Section 102 of the Italian Constitution that the law regulates the cases and forms of the direct participation of the people in the "administration of justice", *id.* Section 108 of the Italian Constitution specifies that the law ensures the independence of judges of special courts, of state prosecutors of those courts, and of other persons participating in the "administration of justice." Section 110 of the Italian Constitution provides that without prejudice to the authority of the High Council of the Judiciary, the Minister of Justice has responsibility for the organization and functioning of those services involved with "justice, *id.* These provisions refer to justice in order to indicate the administration of justice as a state function, in thus conferring the idea that justice and jurisdiction always coincide, *see generally id.*

129. *See* Andrea Simoncini & Elia Cremona, *Mediazione e Costituzione*, 1 GIUSTIZIA CONSENSUALE 3 (2022) (arguing that mediation could be considered as a constitutional scope and 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).

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

131. *See id.* § 2.

132. Carrie Menkel-Meadow, *When Litigation is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL'Y 37, 43 (2002) (hereinafter, "When Litigation is Not the Only Way").

133. *See generally* Judith E. Innes, *Consensus Building: Clarifications for the Critics*, PLANNING THEORY 1, 9 (2004) ("the authentic dialogue . . . is not primarily an epistemological view or ideal type process, but a practical view of what it takes to make robust choices about the future in a real world situation, taking into account diverse views and multiple knowledges and understandings. This view is informed, as I indicated earlier, by the basic principles of interest-based bargaining, but it is most of all informed by more than 20 years of consensus-building practice in a wide array of policy arenas.").

extend and not divide the pie.[134] Talking in terms of Economics, the results of negotiations are more likely to produce "Pareto optimal solutions" than the results of decisions, verdicts, or arbitration awards.[135] In processes where all the real affected persons participate, each issue will have more than just two sides, and, generally speaking, there will be various issues to be resolved. As game theory and other quantitative theories suggest, spreading rather than narrowing the issues increases the likelihood of finalizing good agreements—more trades imply more solutions.[136]

The possibility to encompass different solutions by the affected parties allows them to assess what outcome is the most appropriate to accomplish their needs. In this respect, one can note that the essence of adjudication lies in the office of a judge rather than in the ways the affected party participates in the decision. But the standard of rationality that the judges use to settle a dispute is different from the standards of rationality used by parties for outlining a settlement.[137] Adjudication takes into account positions and arguments, but not interests. For this reason, it is a device that gives formal expression to the influence of reasoned argument in human affairs. Even if rationality also plays a role in contracts, it is impossible to test the rationality in abstraction used to obtain a specific result of the trade. Indeed, to define what is "good," "fair," and "due" in contracts, a key role is based on interests that are different from person to person. The impossibility of considering interests is a limit of the adjudication, and it is one of the main strong points of the settlement. This aspect allows us to consider the actual parties' needs severely.

In addition, the solution to a conflict does not involve only rationality. Feelings, beliefs, and emotions are also (and often) reasons for a dispute. The role of lawyers in the conciliation procedure[138] and of the judges in a judicially-led settlement[139] is to explore not only the legal and economic interests of the parties but also other needs, including social, psychological, political, religious, moral and ethical concerns. These reasons cannot (and must not) influence the judge to outline a decision. Taking into account the real reasons behind the dispute is helpful to avoid the possibility of re-opening the conflict in the future. In other terms: "legal or "legislated

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134. *Id.*

135. *See* JEFFRIE G. MURPHY, JULES L. COLEMAN, PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE 182–83 (1990); *see also* JULES L. COLEMAN, RISKS AND WRONGS 18–19 (1992). The Pareto criteria order individual preferences over social states, *supra*. A social state (S1) is Pareto superior to another social state (S2) if no one is no worse off in S1 than in S2, and at least one person is better off in S1 than in S2. Pareto optimality is itself defined in terms of pareto superiority, *supra*. A social state is pareto optimal if no social states are superior to it, *supra*. Therefore, in a summary, a settlement is Paretian efficient when it increases the wealth of at least one individual without decreasing the wealth of others, *supra*.

136. *See* HOWARD RAIFFA, THE ART AND SCIENCE OF NEGOTIATION 135–47 (1982).

137. *See generally* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 366–67 (1978).

138. Carrie Menkel-Meadow, *Practicing in the Interests of Justice in the Twenty-First Century: Pursuing Peace as Justice*, 70 FORDHAM L. REV. 1761, 1768 (2002) [hereinafter *Practicing in the Interests of Justice*].

139. Howard M. Erichson, *Foreword: Reflections on the Adjudication-Settlement Divide*, 8 FORDHAM L. REV. 1117, 1119 (2009) (stating that "the judge . . . can facilitate the elaboration of norms by relevant actors. By creating contexts within which stakeholders intervene, and by facilitating participation, judges can help the parties and communities involved in disputes elaborate the values that should determine how the dispute is resolved."); *see also* DE STEFANO, *supra* note 5, at 36 (referring to Carnelutti's idea according to which the judge, during the judicially-led conciliation, should act by using "equity.").

justice" may not always be the same as personal or social justice between parties."[140]

(ii) The quality of the results for society

Several authors advocate that encouraging settlement might lead to the risk of producing few opinions and/or precedents, and therefore negatively impacting the quality of the justice for society.[141] This argument leans on the value of adjudication as a public good. Can we firmly state that settlement does not pursue any public ideal? Owen Fiss sustained the value of public ideals and principled deliberation. He described public ideals as moral values about justice, rights, and social cohesion that society should want to defend and which the state is obligated to enforce.[142] However, humans must not necessarily compete over social goods to achieve a better world. Collaboration, community, and cooperation might motivate people to work together to this end:[143] "Justice is not the will of the stronger; it is not efficiency in government; it is not the reduction of violence: Justice is what we discover-you and I, Socrates said-when we walk together, listen together, and even love one another, in our curiosity about what justice is and where justice comes from."[144]

We want to stress here how a procedure that prioritizes restoring the relationship rather than just resolving a dispute does not necessarily represent an "alternative" tool to adjudication. Instead, it may constitute a "complementary" tool to adjudication.[145]

Strictly speaking, the influence and relevance of precedents in any legal system are indisputable. They are sources of information about the things that can and cannot lawfully be done in a society. They are, moreover, in civil as in common law, the ways the law evolves following the new needs of society. To think of settlement as an "alternative" to precedent is a faulty assumption. In contrast, we support the possibility of approaching the relationship between settlement and precedent in terms of "complementarity." To this effect, on the one hand, settlement may play its own role as the rule of law for future conduct. On the other hand, it serves as precedent.

More specifically, the settlement represents a "meeting" of opposing interests that finds a solution according to the parties' needs. Even if in consensual forms, they represent a rule that governs human affairs. So far it would be possible to publish—albeit redacted or anonymized basis—settlement (as well as decisions or verdicts are published)[146] there is an opportunity for a body of "settlements" to develop and to ensure that they have a public utility, to the extent they might represent a

140. Menkel-Meadow*, supra* note 134, at 1769.
141. *See supra* note 96.
142. Fiss, *supra* note 119, at 128.
143. *See generally* Andrew W. McThenia & Thomas L. Shaffer, *For Reconciliation*, 94 YALE L.J. 1660 (1985); *see also* Menkel-Meadow, *supra* note 132, at 46–50 (referring to the idea behind the Prisoner's dilemma and the game theory to support the value of cooperation.).
144. *See* McThenia & Shaffer, *supra* note 143, at 1665.
145. *See* It. L. No. 206/2021 § 1, para. 4, letter b (2021) and the relative Legislative Decree No. 149/2022. In this respect, the new Italian Reform of civil justice that is generally intended to reinforce ADR mechanisms refers clearly to ADR as "complementary" tool to the traditional trial rather than to alternative, *id.*
146. We are mainly referring to the judicially-led settlements.

way to deal with a similar case in the same manner.[147] In this respect, we refer to the specific and autonomous role of settlements in terms of *rule of law*.

In addition, the hotly debated results of the settlement process could help judges to establish good precedents.[148] Good precedents mean, on the one hand, respecting instances of certainty and equality. In addition, they lead to fewer appeals and, thus, a system that automatically becomes more efficient. On the other hand, if the value of precedent is strengthened, the terms of the settlement may also increasingly be inspired by or agreed upon based on the terms of precedents. In other words, the precedent and the settlement are complementary and not alternative tools of justice.

IV. THE COMPARATIVE SOLUTION: CONTINENTAL EUROPEAN TOOLS TO PREVENT COERCED SETTLEMENT AND JUDGE'S BIAS

The rules encouraging in-court settlement must facilitate parties' ability to reach voluntary agreements. Therefore, an appropriate procedural framework for its promotion must be able to prevent coerced conciliation and protect the judge's impartiality. As we previously noted, there is now a convergence in supporting in-court settlement across Western culture as an efficiency and justice-enhancing device, to the extent that a new approach to the global overriding subject of the civil process can be coined. Nonetheless, even across this global procedural trend toward in-court settlement, the analysis between common law and civil law systems we sketched in Paragraph II.B shows how the main divergence lies in the discretionary managerial power of the judge in the U.S. system. The perspective of this paper is to borrow the tools sketched by civil law systems to avoid a judge's high discretionary use of managerial power which can flow into a coerced settlement.

A. The Judicial Attempt to Conciliate the Case During the Trial, in a Mandatory Hearing, Before the Parties

The discretionary power of the judge to facilitate conciliation cannot be considered only a blunder of the in-court settlement framework. On the contrary, the judicial discretionary in conducting in-court settlement accomplishes the task of tailoring each case to specific needs. Flexibility goals can be achieved via the

147. *See Áine* Clancy, *A Better Deal? Negotiated Responses to the Proceeds of Grand Corruption*, 33 CRIM. L.F. 149, 182 (2022). *See generally* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 260 (1999) ("Importantly, however, the judge can help the consistency of estimates by indicating his leanings on a particular issue. The judge can help eliminate strategic behavior by collecting settlement figures from each side and indicating whether there is an overlap. Judges have in fact employed both of these techniques, and characteristics of the judge deciding the case are significant predictors of the likelihood a case will settle.").

148. Lederman, *supra* note 147, at 256 ("[T]hus, in general, the public has a stronger interest in precedent than do private litigants. However, the public also benefits from lowered public costs of litigation. This in turn implies a need for settlement because, if the volume of trials increases, at some point there may be a need to increase the number of judges or courts-which are funded by public money. The public therefore has some interest in a certain volume of settlements, but much less of an incentive that any particular case settles than do the individual litigants.").

discretion conferred to the judge in evaluating possible settlement following the acknowledgment of specific facts and evidence.[149]

The comparative analysis regarding in-court settlement first highlights how the civil proceeding structure may impact judicial settlement powers and its perception. In the U.S, any judicial conciliation attempt intervenes in a moment that is not devoted to the adjudication, i.e., the pre-trial. Thus, the moment in which the disclosure and discovery are taking place is also when the conciliation may occur. Moreover, there is no specific time window during the pre-trial dedicated to the settlement in the U.S.,[150] while German, French, and Italian proceedings do not know the distinction between pre-trial and trial. In civil law systems, a claim implies only a single event (the trial), structured in several hearings. Parties start the trial through the respective introductory acts on the issue of facts and the issues of law addressed to the judges. In the context of the trial, a specific and mandatory hearing for settlement takes place in the presence of the parties.[151] The dichotomy in the structure of the proceeding leads to several reflections.

Firstly, in civil law systems, the settlement is part of a process aimed towards adjudication. Such a structure weakens the discrepancy between adjudication and settlement. They can both be considered two aspects of a single path that is nonetheless devoted to adjudication. Moreover, on the path toward adjudication, the civil law judge has to promote conciliation in every phase of the civil proceeding. In contrast, the scope of U.S. pre-trial is preparation, through the acknowledgment of facts, claims, and evidence of the case, for a possible trial phase, and only the latter is devoted to adjudication. Thus, the settlement and the adjudication become aspects of two different paths. In this respect, civil law structure is hugely significant because it places the judicial conciliation and adjudication functions on the same level.[152]

Secondly, civil law systems provide a specific hearing during the trial, dedicated to settlement, which is mandatory.[153] In other words, the judge has not just the power, but the "duty" to stimulate conciliation, just as it is their duty to adjudicate. The compulsoriness of the conciliation attempt does not imply that the parties are obliged to settle. Moreover, it does not undermine the discretionary ways in

149. Biavati, *supra* note 98, at 796 (discussing the strength of flexibility for an effective in-court settlement); *see also* Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002) (justifying discretion by stating that it is "a useful rulemaking technique when it is difficult—as it almost always is—to foresee even the most important problems and to determine their wise resolution.").

150. *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.").

151. *See supra* notes 39–42, 48, 52–54; *see also* Biavati, *supra* note 98 (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).

152. *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).

153. *See supra* notes 39–40, 48, 52.

which the judge might facilitate or stimulate the settlement based on the type of the dispute. While again, the compulsoriness of the conciliation attempt demonstrates that the duty to stimulate conciliation has the same value of the adjudicative duty.

Thirdly, the civil law rule regulating the mandatory hearing for settlement purposes provides also that the parties should appear in person for the discussion before the judge to be heard on the settlement proposal.[154] The strict observance of this duty allows the judge to ask questions on the claim while discussing the terms of a possible settlement, thus enforcing equal treatment for the parties.[155] 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.

Fourthly, in every civil law system, the rule that regulates in-court settlement is autonomous, and mostly it does not afford different and even independent regulations regarding other managerial powers, as Rule 16 of the U.S. FRCP does.

The mentioned considerations aimed to demonstrate how the civil law judge's analytic acknowledgment of the claims and the facts since the lawsuit's origin, along with a definite "procedure" for settlement in the presence of the parties occurring during the trial, may favor the conciliation proposal and prevent the non-impartiality of the judge and the coerced settlement.[156] This framework in structuring the civil proceeding may impact the Rule 16 settlement's provision. Rule 16 considers 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.[157] Moreover, pretrial proceedings are largely committed to judges' discretion, and to this effect, Rule 16's regulatory structure for settlement is primarily permissive, not limiting.[158] This is because when the 1983 amendments—and shortly after the 1993 ones[159]—enhanced the settlement's ending-type as a normative goal, the balance between efficiency and fairness would have needed a procedural amendment in structuring the pretrial phase.[160] Professor Judith Resnik effectively spawned this point[161] when she famously questioned the wisdom of the increase in judicial authority associated with these "judge initiated, invisible, and unreviewable" roles due to the absence of procedural safeguards to protect parties

154. *See supra* text accompanying notes 41, 53.

155. Stürner, *supra* note 8, at 47–48.

156. *See* Edgar A. Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice*, 203-05 (Melvin J. Lerner., 1988); *see* also Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L J. OF PSYCH. 117, 119 (2000). Research showed how "procedural justice" has enormous effects, *supra*. If, indeed, people perceive that a dispute resolution or decision making as fair, they are more likely to also perceive the outcome as fair, even if the outcome is not favorable to them, *supra*.

157. FED. R. CIV. P. 16(a)(1), (2), (3), (4).

158. Deason, *supra* note 28, at 78.

159. *See* Leslie M. Kelleher, *The December 1993 Amendments to the Federal Rules of Civil Procedure—A Critical Analysis*, 12 TOURO L. REV. 7, 80–82 (1995).

160. *See* Alfini, *supra* note 4, at 11 ("The problem is that we have created the necessary ethics infrastructure to support this settlement culture. In many respects, this important aspect of our litigation process is in a state of anarchy.").

161. *See* Judith Resnik, *The Privatization of Process: Requiem for and Celebration of The Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1803–06 (2014); *see also* Judith Resnik, *Trial as Error, Jurisdictions as Injury: Transforming the Meaning of Article III,* 113 HARV. L. REV. 924, 936 (2000).

from abuse of that authority.[162] Accordingly, while Rule 16 evolution changed the judicial role in the pretrial phase, the settlement's explicit encouragement was partially unexpected by lawyers and parties, especially considering the enhanced discretionary powers of the judge in managing the dispute before the trial phase. This change, without a connected change in the structure of Rule 16, (inevitably) created biases towards the settlement's ending-type.

For this reason, the settlement's encouragement provision would firstly need to stand alone primarily as a separate rule. As a general provision included in many other rules regarding the managing powers during the pretrial conference, it is not surprising that the settlement's encouragement is not detailed. This way—so far to be a mere terminological change—allows us to take more directly each issue that emerged from the massive literature on the matter. And finally, it will enable us to reconsider how to face the danger of coercing settlement. In civil law countries, the *ad hoc* rule and a definite mandatory hearing before the parties grant a judicial legitimacy and authority that, in the end, represent the most suitable and impartial power in favoring parties' conciliation—which is the opposite of a potential vanishing of the trial.[163] The mandatory conference can give the parties their day-in-court[164], i.e., the fulfillment of the main principles belonging to Continental civil procedure in the era of codification: orality, concentration and immediacy.[165] These principles inspired Continental civil proceedings' purposes to achieve the decision of cases as quickly and rightly as possible. More specifically, the principle of concentration indicates that a case should be treated in a single hearing, or in a few, close oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be excluded.[166] 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.[167] 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.[168]

The comparative view shows how in reality the critical issues are not the judge's (lack of) impartiality or the coerced settlement. The occurrence of a settlement depends on whether some requirements are met:

- the existence of the duty to attempt conciliation in each case;
- the existence of a mandatory and autonomous hearing for settlement;

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162. Resnik*, supra* note 77, at 414.

163. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW, 94-108 (1990) (hereinafter, "WHY PEOPLE") (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) [hereinafter *Citizens Discontent*].

164. DAMAŠKA, *supra* note 124, at 51.

165. *See* GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE 370–72 (1934). *See also* ENRICO T. LIEBMAN, LEZIONI DI DIRITTO PROCESSUALE CIVILE 115–16 (1951).

166. CHIOVENDA, *supra* note 165, at 371–72; *see also* LIEBMAN, *supra* note 165, at 116.

167. CHIOVENDA, *supra* note 165, at 370; *see also* LIEBMAN, *supra* note 165, at 116.

168. CHIOVENDA, *supra* note 165, at 370; *see also* LIEBMAN, *supra* note 165, at 115.

- the judge does not have a personal interest in the case;
- the judicial involvement in the settlement respects the minimum due process clause;
- both parties must be present in person during the negotiation process and have the chance to be heard;
- the judge must record the negotiation process and the parties' clear and sharp willingness to resolve the dispute, as it must be done in any hearing;
- the existence of an autonomous and specific rule that properly regulates in-court settlement and, thus, the mentioned aspects.

In getting through these requirements, the possible judge's anticipated view on the merits of the case, eventually revealed during this negotiation process, does not deal with impartiality. The mentioned procedural caveats grant, in fact, the judges' equidistance, and their view on the case's merits—whether or not explained and discussed in the pretrial hearing—might help parties to conciliate.[169] In any case, the promotion of settlement—through a specific and recorded negotiation process—may be subjected to control, and consequently, it will not result in a coerced settlement. In the described terms, the settlement encouragement represents a legal proceeding before a public authority to ensure the parties' willingness to resolve the case, as it is at a trial devoted to adjudication. The neutrality conferred to the judge by procedural rules is apt to reject the specter of a coerced settlement, and alleviate fear that underestimates judges' understanding of their role and the judge's independence.[170] The same fears would be potentially connected to adjudication. However, 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.[171] The respect of the mentioned requirements indeed 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

169. *See* Deason, *supra* note 28, at 125 (quoting JENNIFER K. ROBBENNOLT & JEAN R. STERNLIGHT, PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING 16, 77–83 (2012) ("One of the most effective methods for avoiding bias in a decision-making process is to deliberately consider opposing viewpoints and arguments." This is perfectly consistent with the adversary theory according to which the decision-maker hears arguments presented by both sides of a case.).

170. *See* LIND & TYLER, *supra* note 156, at 209; TYLER, *supra* note 163, at 94–108; *Citizen Discontent*, *supra* note 163, at 886 ("[T]he public has a very moral orientation toward the courts" and "[t]hey expect the courts to conform to their moral values", especially regarding "the fairness of the procedures by which the courts make decisions"); *see also* MARCUS ET AL., *supra* note 112, at 3, ("[T]here is reason to believe that litigants tend to judge the justness of dispute proceedings without reference to the outcome if they deem the process itself to have been fair. Thus, procedure serves to validate the integrity of the legal system as a whole by providing a remedial process that replaces much more destructive motivations like self-help and personal retribution.").

171. LAHAV, *supra* note 96, at 2 ("[T]hese values of litigation – enforcement, transparency, participation, and social equality – are the key components of a well-functioning democracy.… [these features are] the proper yardstick for measuring the success or the value of our court system").

treatment from the decision-maker; (iii) even-handed treatment, neutrality of forum; (iv) the trustworthy consideration from the decision-maker.[172]

The relevance of procedural justice allows another consideration. The critics of settlement based on the role of precedents[173] imply that trials are more "just" or "fair" than private negotiation. This is a misconception for two reasons. Firstly, judges, even in the adjudication, may also act arbitrarily or irrationally.[174] The procedural mechanism is intended to prevent such shortcomings in the adjudication, as well as it is intended to prevent them in the in-court settlement.[175] In other terms, the outcome, a settlement or a decision, is "just" if the procedure to get it is "fair." Moreover, reconciliation is also apt to get one of the scopes of the civil process, i.e., to solve conflicts,[176] and, even in this respect, it can be considered as fair as the adjudication.

B. Precautionary Techniques of Judicial Participation

There are several techniques for judicial participation in the settlement bargain. Firstly, as we mentioned, a U.S. judge is not obliged to attempt a settlement between the parties; instead, a civil law judge has the duty to try, in a specific hearing, in the presence of the parties, to conciliate any dispute.

Even in jurisdictions where the court's endeavor towards settlement is mandatory, the ways in which the court may exercise this duty are wide-ranging. In other terms, even if civil law countries provide the encouragement of the settlement as mandatory for the judge, contrary to the U.S. where it is a judicial discretionary activity, then at a practical level, the civil law countries also face a wide range of techniques for judicial participation, some of which are discretionary and other mandatory. We have outlined the techniques we will sketch as "precautionary" because careful consideration of them might help to prevent the drawbacks typically addressed to in-court settlement.[177]

The precautionary techniques commonly used by civil law judges might be divided into two types. The first type is the "mandatory" techniques, i.e., those requirements provided by the law governing the in-court settlement activities. We have sketched these requirements in the previous Sections since they are strictly related to the structure of the civil law trial; indeed, civil law legislators provided them for regulating the in-court settlement.[178] Briefly, they are the use of a conference for facilitating settlement and the personal confrontation of disputants. The use of conference, as said, is intended to respect the devices that civil procedure codes

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172. *See* SOURDIN & ZARISKI, *supra* note 10, 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); *see also supra* notes 42–48.

173. *See* Luban, *supra* note 93; s*ee also supra* note 96 and accompanying text.

174. Miller, *supra* note 74, at 22.

175. SOURDIN & ZARISKI, *supra* note 10, at 65–69.

176. FRANCESCO CARNELUTTI, SISTEMA DEL DIRITTO PROCESSUALE CIVILE 173 (1938); Piero Calamandrei, *Il concetto di lite nel pensiero di Francesco Carnelutti*, RIVISTA DI DIRITTO PROCESSUALE CIVILE 1, 1–3 (1928).

177. *See* Stürner, *supra* note 8, at 47.

178. ZIVILPROZESSORDNUNG [ZPO] [Code of Civil Procedure], § 278 (Ger.); Codice de procédure civile [C.P.C.] [Civil Procedure Code], §21 (Fr.); Codice di procedura civile [C.p.c.] [Code of Civil Procedure], §185 (It.) (along with the relevant amendments brought by the 2021 Italian Reform of the civil litigation).

provided for due processes, like the possibility of recording them and thus controlling the outcome. Moreover, the authority of the judge to require the parties' participation and state their respective claims can eliminate the differences caused by poor communication and promote equality.[179] Confrontation on a person-to-person basis also strengthens the possibility of a settlement taken on a truly voluntary basis.

The second group of techniques, the discretionary ones, includes those commonly used by civil law judges to prevent the typical drawbacks of their involvement in the bargaining process. They are derived from courtroom practice, and their emergence is clearly connected to the peculiar structure and mandatory requirements of the related judicial systems. The first is the "hints and feedbacks" technique.[180] Since conferences and parties' participation implies a discussion, in a moment where introductory pleadings have been filed, a powerful tool of the judge in encouraging reasonable settlements is the judge's power and duty to give hints and preliminary evaluative feedback on the parties' claims as they are stated and understood by the judge. The judge's duty to provide hints and feedback on the legal and factual sufficiency of the parties' positions is at the core of the judicial function in civil litigation. This practice, when used in the settlement conference, gives the chance to clearly state both parties' claims.[181] Even if the pleadings are founded on "factual sufficiency" across Western countries,[182] only with the discussion on claims, also by means of questions made by the judge, parties become able to appraise the opposite position, screen meritlessness, prevent information asymmetry, and thus to create the conditions for pondering or delineating a fair and voluntary settlement. The direct discussion between the judge and the parties encompasses emotional involvement by the parties, the acknowledgment of each other's underlying needs, goals, fears, and feelings, the opportunity to observe the other party's tone and body language directly, and the possibility of rebutting opposite positions.[183] This technique is thus apt to prevent parties feeling coerced to settle. Moreover, this technique, along with the fact that it intervenes in a public hearing, might solve the inequality of resources issue. As we sketched in paragraph II.A, inequality of resources is connected to information asymmetry issues. It is worth noting that inequality issues may also arise during a trial devoted to adjudication; for instance, resources may influence lawyers' presentation quality. The managerial power of the judge to hints and feedback and to trace the exact boundaries of the claims, for example, to restrict useless discovery, helps put parties on the same level and thus reduce, instead of enhancing, the inequality of resources. And this is valid both for settling procedures and for trials.[184]

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179. Stürner, *supra* note 8, at 47–48.

180. *Id.* at 48.

181. *Id.*

182. *See* Bell A. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 555 U.S. 1030 (2008) (United States Supreme Court cases on the factual sufficiency standard for the pleading; *see also* Art. 163 C.p.c (showing that the plaintiff's initial complaint must provide a detailed statement of the claim); ZPO §130 (showing that the in the initial pleadings, the parties state the exact facts of their respective versions of the case and present evidence supporting their defenses).

183. Robinson, *supra* note 84, at 128–42.

184. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1353 (2010) (the same argument on the benefits of the managerial powers has been used regarding the risk of information asymmetry issue that can be caused by plausibility standards for pleading); *see also* Scott Dodson, *New Pleadings, New Discovery*, 109 MICH. L. REV. 53, 86–88 (2010).

During the discussion, another discretionary method for correctly promoting settlement pertains to the performance of giving hints and feedback. More specifically, when engaged in such activity, the judge must resist the temptation to slightly slant the "clarifications" to induce a recalcitrant party to settle.[185] In this respect, judicial neutrality might be granted in so far as the judge can give a grounded and neutral evaluation of the parties' respective positions based on the judge's knowledge of the case to date, without any preview on his final decision.

Judges are also allowed to propose to parties the framework of a potential settlement.[186] This is one of the most problematic powers since it readily exposes the judge to non-impartiality or coerced settlement risks. In this respect, a judge's 'rights-based' suggestions for settlement are less controversial. Since these suggestions are grounded on matter of law, they are commonly accepted by the parties. In contrast, 'interests-based' suggestions become debatable. Since they imply a personal evaluation on facts, they quickly expose the judge to criticism. The judge, in a such a case, must refrain from including elements of the parties' conflict that are not within the frame of reference of the parties' claims and factual assertions.[187] In other words, the principle "*ne eat iudex ultra petita partium*" (the judge might not decide beyond parties' factual claims), which is one of the cornerstones of the civil procedure, is to be analogically applied also to the settlement's proposal.[188] By introducing issues beyond the subject matter in dispute without the consent of both parties, the judge's neutrality might be clearly undermined. As a consequence, judges should act mindfully and cautiously when fishing for facts designed to clarify a party's 'real interest'.

C. The Inconvenience to Replace the Judge: When a Settler become a Decider

In the civil law system, the settlement judge and the trial judge always coincide. In the same way, the combining role of settler and adjudicator is currently permitted by Rule 16 of the U.S. Federal Rules of Civil Procedure.[189] To address the problem of the judge becoming biased by unsuccessful negotiation when she decides the case, one can ask if replacing the settlement judge would be an appropriate solution when the negotiation fails.[190] To this effect, the judge's bias

185. Stürner, *supra* note 8, at 48.

186. *See* ZPO § 278(6) (which expressly states that a settlement may also be made by parties' accepting, in a corresponding brief sent to the court, the suggested settlement made by the court in writing). *See also* C.p.c. Art. 183-*bis* (that expressly provides that 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 regarding the nature and the value of the dispute, and only if the subject of the lawsuit allows easy and prompt legal solutions).

187. *See* Stürner, *supra* note 8, at 48.

188. *See* LIEBMAN, *supra* note 165, at 112.

189. FED.R. CIV .P. 16(a)(5) states that "in any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as: […] (5) facilitating settlement." S*ee also* Resnik, *supra* note 4, at 529–30 (showing that "as federal judges self-consciously shift roles from adjudicator to case-manager to settler").

190. *See* Goldstein, *supra* note 12, at 991; CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 377 (2016); Alfini, *supra* note 4*,* at 119; Martin A. Frey, *Does ADR Offer Second Class Justice?,* 36 TULSA L.J. 727, 760 (2001); Campbell Killefer, *Wrestling with the Judge Who Wants You to Settle*, LITIGATION 17, 21 (2009); Patrick E. Longan, *Bureaucratic Justice Meets ADR: The Emerging*

risk could impact litigants' behaviors during the negotiation. Parties, indeed, would feel the threat of being forced to settle or would be reluctant to divulge their positions to the judge who will preside at the trial. The issue has been perceived mainly in the common law jurisdictions, where concerns that the pre-trial judge who facilitated the settlement will be the same person as the judge who will preside over the trial have been strongly raised, especially for the non-jury cases.[191] In 1996, the American Judicature Society (AJS) addressed the subject of judicial settlement ethics.[192] The AJS publication included a compendium of judicial settlement techniques categorized by "acceptability" and "inappropriateness," with great caution for acceptable techniques that could be, nonetheless, inappropriate in specific circumstances.[193] To this effect, *ex parte* discussions (i.e., the discussion judge may have with only one party), even acceptable in principle, will become inappropriate if the settlement judge becomes the trial judge following a failed negotiation.[194] Moreover, Canon 3 of the official Code of Conduct for United States Judges, adopted by the Judicial Conference of the United States, provides an identical provision. It prohibits judge *ex parte* communications, i.e., to confer separately with the parties and their counsels to mediate or settle pending matters, unless she has "the consent of the parties."[195]

It is undoubted that an adversarial culture, and the related image of the umpire judge, disapproves of active judicial involvements in the settlement. This is because the adversarial culture perceives the drawbacks of an active judge more intensely than jurisdictions that have a long-established culture of managerial judging, such as Continental European systems.[196] Nonetheless, we believe that the acceptance of the unique judge (the same person for the settlement and the trial) is more widespread in civil law systems not only for the established non-adversarial tradition, especially considering that, now, the dichotomy adversarial-inquisitorial appears

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Role for Magistrates as Mediators, 73 NEB. L. REV. 738 (1994); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1593 (2003)(showing how much discretion judges have); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 511 (1986); Judith Resnik, *supra* note 77, at 435; Frank E.A. Sander, *A Friendly Amendment*, DISP. RESOL. MAG. 11, 24 (1999); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CT-I. L. REV. 337, 364 (1986); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 760 (1989); James A. Wall, Dale E. Rude, Lawrence F. Schiller, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 J. ON DISP. RESOL. 81,91–92 (1988). *See also* Deason, *supra* note 28, at n. 373 (showing that U.S. judges have expressed the personal view that settlement negotiations should not take place before the judge who will later adjudicate the case, or they have proposed separating these functions).

191. *See* A. Leo Levin & Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U. FLA. L. REV. 29, 41 (1985) ("The judge who will preside over the trial of a case stands in a very special relationship to the litigants. The control he or she has over the lawsuit may cause any suggestion that the case should be settled to be perceived as a threat." "Litigants might also be unwilling to divulge their true positions to the judge who will preside at trial.").

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

193. *Id*. at 7.

194. *Id*. at 70.

195. *Code of Conduct for United States Judges*, U.S. CTS. 6, https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf (last visited May 18, 2023).

196. Goldstein, *supra* note 12, at 991.

blurred in practice.[197] Civil law acceptance for the settlement/trial judge grew due to civil law procedural traditional tools apt to enhance perceptions of procedural justice.[198]

Several empirical studies regarding judicial settlement conferences have included research on the techniques that lawyers perceived judges commonly used, lawyers' preferences among these techniques, and techniques lawyers found troublesome.[199] A recent empirical study indicates that lawyers continue to have deep concerns about their ability to be candid and fully discuss settlement with judges facilitating settlement, regardless of whether they are presiding or non-presiding at trial.[200] More specifically, the lawyers specified that they feared settlement discussions might prejudice the litigation or adjudication of their cases or that judges would become biased.[201] Dr. Roselle Wissler, who conducted this research study, hypothesized that the primary reasons for lawyers' hesitation depend on (1) the fear that their disclosures could influence the judges' non-substantive decisions in the instant case; (2) the fear that their disclosures could influence the judges' substantive and non-substantive decisions in future cases; and (3) the fear that non-presiding judges will not keep settlement communications confidential and, instead, that non-presiding judges will intentionally or unintentionally share information or perceptions with trial judges.[202] This research and the relative lawyers' qualms, especially in the matter of confidentiality, demonstrate how the fear of a biased judge at trial is not strictly connected with the aspect of the same identity in the person of the settlement judge and the trial judge. In comparison, it shows how lawyers' views of settlement procedures might depend on whether there are explicit provisions, regulations, procedures regulating limitations, or confidentiality on what may be reported to the trial judge. If these requirements are missing, even the distinction between the settlement judge and the presiding judge might not increase the trustworthiness of the judicial negotiation.

We continue to maintain that if people perceive the procedure as fair, they are more likely to perceive the institution providing the procedure as legitimate,[203] even if the same institution is involved both in the settlement procedure and in the adjudicative process. The American Judicature Society (AJS) publication recommendations on *ex parte* communication[204] confirm that a severe regulation of behaviors that could impact the due process or a fair decision of the case is the correct path to prevent mistrust in the institution.[205]

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197. *See generally* Cavallini & Cirillo, *supra* note 20.

198. *See generally* Welsh et al., *supra* note 172, at 65–77 (discussing a study aimed at understanding techniques that lawyers—and eventually clients—find especially helpful in enhancing perceptions of procedural justice during judicial settlement).

199. *See* Robinson, *supra* note 84, at 99 (presenting empirical data on judges' perceptions regarding their influence on settlement and it connected to a series of articles on the matter at stake); *see also* WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES 12 (1985).

200. Roselle L. Wissler, *Court-Connected Settlement Procedures: Mediation and Judicial Settlement Conferences*, 26 OHIO ST. J. ON DISP. RESOL. 271, 284–87 (2011).

201. *Id*. at 286.

202. *Id.* at 317.

203. *See supra* text accompanying notes 156, 163.

204. GOLDSCHMIDT & MILORD, *supra* note 192*,* at 70.

205. Molly McDonough, *Meddling in Settling: Pressure to Clear Caseloads Spurs Judges to Coerce Settlements, Critics Say*, 91 ABA. J. 14, 15 (June 2005) ("When judges feel burdened by their caseloads,

It is interesting that, on the same matter, the same AJS and Code of Conduct for United States Judges, outcomes are followed by the ELI Rules, as we have sketched in paragraph II.B. The ELI Rules do not suggest a replacement of the settlement judge when the negotiation failed.[206] In principle, the same judge might preside over the trial. However, in the case of *ex parte* communications, the ELI rules provide that when a judge mediates during a settlement process and receives information in the absence of one of the parties, that judge must not decide the case.[207] ELI Rules have also a stricter approach, since they do not provide neither the exception of the consent of parties to allow *ex parte* communication.

The civil law justice approach confirms how each procedure, also in relation to in-court settlement, must always be designed to achieve procedural justice. If in-court negotiations fail, the requirement neutrality of the forum does not necessitate a replacement of the judge. Even a failed negotiation, if a defined procedure took place, according to the rules we anticipated in the previous paragraph (a public hearing, in the presence of the parties, etc.), is apt to grant the judge's neutrality. When the principles under these rules risk being severely breached, as it is in *ex parte* communications, a substitution of the judge is appropriate. It could be appropriate to provide a specific rule on *ex parte* communication that, on the one hand, prohibits them and, on the other hand, prescribes the recusal or the disqualification of the judge in case of its breach. Here, the settlement/trial judge clearly is in a position to be exposed to information that could affect his perceptions of equity. The absent party cannot know what the information is and cannot have an opportunity to rebut it.[208] But, in the latter case, the bias-risk does not lie in the identification of the settlement judge with the trial judge, but rather in the failure to respect those rules that are apt to guarantee they fairly try the case.

Another conclusive argument that confirms the drawback of replacing the settlement judge if the negotiations fail, pertains to the procedure's efficiency and effectiveness. A judge who has presided over the settlement hearing has personal knowledge of the facts, the claims, the parties, and counsel that a colleague on the court cannot possess at the start of a settlement process. On the one hand, this familiarity will avoid that a new judge should restart studying from the beginning, which would be a clear waste of judicial resources.[209] Moreover, in terms of the

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they often turn to alternate dispute resolution methods, including mediation. ADR experts claim that when judges overreach or improperly meddle in the dispute to arrive at a settlement to avoid going to trial, the pressure to settle undermines the legitimacy of the litigation"); *See also* Catherine A. Rogers, *Context and Institutional Structure in Attorney Regulation: Constructing an Enforcement Regime for International Arbitration*, 39 STAN. J. INT'L L. 1, 43, n. 227 (2003) ("[E]thical rules impose almost absolute restrictions against *ex parte* communications between attorneys and judges, except in certain rare procedural contexts").

206. *See* ELI-UNIDROIT MODEL RULES OF EUROPEAN PRO., *supra* note 3, at R. 10(4).

207. *See id.*

208. Robinson, *supra* note 84, at 135–36; *see also* Deason, *supra* note 28, at 114–115 (discussing that in reference to *ex parte* communication "[t]he danger to impartiality is the extensive amount of information—unfiltered by the rules of evidence—that judges obtain during informal mediation proceedings").

209. Dan A. Polster, *The Trial Judge as Mediator: A Rejoinder to Judge Cratsley*, 5 MAYHEW-HITE REP. ON DISP. RESOL. & CTS. 3 (2006), https://kb.osu.edu/handle/1811/86584 (emphasizing the judge's understanding of a case obtained from the case management conference and the limited time available to prepare for settlement of a case on another judge's docket); Robert C. Zampano, *From the Bench:*

procedure's effectiveness, this strong familiarity may make the deciding judge more accurate in evaluating the strengths and weaknesses of the case and, thus, enhance the possibility of deciding the case fairly.[210]

CONCLUSION

Due to the new challenges that globalization imposed on the civil procedural systems across the world, every country boasts reforms aiming at implementing new institutions, especially in the form of ADR, to reduce the inefficiency and ineffectiveness of the civil process.[211] One of them is the promotion of the judicially-led settlement, which has the peculiarity of being an alternative tool, despite being performed in the courtroom. The worldwide favor for settlement suggests that a new procedural philosophy made inroads globally. Delays, costs, and low access to justice urged the necessity to impose a new overriding subject of the judicial process that does not deal only with the search for the truth and, thus, the need to secure substantive justice. Instances of proportionality and equitable access to justice move the system towards the necessity to secure distributive justice.[212] Each structural reform should bear and incorporate these new challenges. Thus, the function of the judicial system is not only to justly decide the cases according to the law and the facts but also to fairly distribute its resources between all those seeking justice. The assertion of the in-court settlement as a proper efficiency and access to justice-enhancing device goes hand in hand with this new philosophy in civil procedure.

Moreover, methods—such as judicially-led settlement—enhancing conciliation should not be considered an enemy of adjudication. Adjudication and settlements are complementary, and not alternative tools of justice. On the one hand, as a benefit for the parties, conciliation might consider litigants' interests and needs. Moreover, as a benefit for society, it pursues instances of peace and reinforces – rather than attenuates – the role of precedents. By positively impacting the number of dockets, settlement helps judges to settle good precedents. Goods precedents also represent guides for defining terms of future settlement.[213]

Nonetheless, even clearly embodying in their structure this new overriding subject and accepting conciliation general benefits, civil procedure systems must develop tools that avoid the judge's high discretionary use of power, to avoid resulting into indirectly forced settlements or remain at the risk of judicial partiality.[214] The civil law in-court settlement structures represent a good source of understanding methods to overcome the qualms concerning the institution at stake. The German, French and Italian systems provide a precise structure for the settlement within the

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Settlement Strategies for Trial Judges, 22 LITIG. 3, 4 (1995) (stressing the need for the judge to be familiar with the case).

210. Deason, *supra* note 28*,* at 108 (underlining that "[t]he informational argument loses force, however, if settlement occurs early in the case before extensive pretrial activity. Moreover, the possible gains in efficiency when an assigned judge serves as settlement judge must be weighed against the very substantial risks"); *see also*, Edward J. Brunet, *Judicial Mediation and Signaling*, 3 NEV. L.J. 232, 234 (2003) (endorsing evaluation and prediction by an assigned judge since it provides a signaling function that can inform parties' assessment of their prospects at trial).

211. *See generally* Laura Nader, *The Globalization of Law: ADR as "Soft" Technology*, 93 PROC. ASIL ANN. MEETING 304 (1999); *see also* discussion *supra* Section I.B.

212. *See* discussion *supra* Section III.A.

213. *See* discussion *supra* Section III.B.

214. *See* discussion *supra* Section II.A (concerning risk of coercion).

process and regulate it in an autonomous and specific rule. 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.[215] Insofar as it strengthens procedural justice, this specific framework has the virtue of reinforcing the disputants' trustiness in the judge's activities. These techniques should be enforced in any system that aims for a valid promotion of settlement.

Nonetheless, within this structure, the judge, even in civil law systems, has the discretion on how to promote settlement, i.e., just facilitating it or proposing the possible positions. However, the Continental European countries' practice has developed precautionary techniques that the judges must try to follow to avoid their discretionary flowing into a coerced settlement. For instance, a judge should limit its high involvement in proposals that implies interest-based deliberations. Furthermore, the value of judicial discretionary power should not prevail where some conducts are inherently likely to undermine the litigants' trust in the system. To this effect, *ex parte* communication should be prohibited.[216] As the ELI rules prescribe, if a judge provides this type of communication and the negotiation fails, the judge should be replaced.[217]

To conclude, society is ready, at a global level, for a complete change in the litigation culture and a new approach to civil justice. The consistency of the in-court settlement with the new overriding subject of civil justice, its distributive justice goals and its qualitatively appreciable results confirms that it represents a form of *appropriate* dispute resolution method. Moreover, the comparative lens demonstrates that the civil law structures are apt to prevent the drawbacks typically related to the judicially-led settlement. To this effect, in-court settlement regulations as Rule 16 of the U.S. Federal Rules of Civil Procedure need to be reshaped to confer the same due process tools provided for the adjudication to the bargaining process.

215. *See* discussion *supra* Section IV.A.
216. *See* discussion *supra* Section IV.B.
217. *See* ELI-UNIDROIT MODEL RULES OF EUROPEAN PRO., *supra* note 3, at R. 10(4).