

The controversial issue of Mandatory Mediation: the Italian experience

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This study is aimed to:

- A. Offer an *excursus* of Italian background on Mediation
- B. Offer an analysis of the mandatory mediation Directive as implemented by the Italian legislative system
- C. Observe how the efficacy of implementing mandatory mediation requires the support of the legal profession and the judiciary system
- D. Analyze some data released by Italy's Ministry of Justice, regarding the impact in practice of the mediation decree

Key Definitions

- We refer to mediation based on the **facilitative approach** as opposed to evaluative methods, and we consider mediation only with respect to civil and commercial disputes.
- As far as mandatory mediation, **"mandatory"** pertains to the **referral** to mediation.

EU Initiative: the 2008 EU Directive

- Following the release of the Green Paper (2002), the EC adopted **Directive 2008/52/EC** of the European Parliament and of the Council of 21 May 2008 on “Certain Aspects of Mediation in Civil and Commercial Matters”.
- **Main purpose:** to build trust in the process of mediation within the EU, (a) by facilitating access to alternative dispute resolution and promoting the amicable settlement of disputes, (b) by encouraging the use of mediation and providing a balanced relationship between mediation and judicial proceedings. It applies in cross-border disputes to civil and commercial matters.

The Status

- Despite the general ADR movement, according to the statistics, it seems that the **Directive has not yet achieved its objective** stated in its Article 1: ‘to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.’
- Seven years since its adoption, it has not been implemented nor consciously utilized by all EU States: mediation is still used in less than 1% of the cases in the EU.
- In fact, **only one country, Italy, has a reported number of mediations exceeding 200.000 annually.** The next three countries Germany, Netherlands, and UK – exceed 10.000 only, while a significant number of EU Member States report less than 500 mediations per year.

An overview of the Italian background on Mediation

the '90s Initiatives

- Mediation is not new in Italy. Since early the '90s, Italy's Code of Civil Procedure (c.p.c.) has provided for voluntary mediation in cases pending before a *Giudice di Pace* (Justice of the peace).
- Law No. 580, enacted in **1993**, restructured Italy's **chambers of commerce**, giving them a broad mandate to develop mediation in their assigned territories. This mandate included:
 - ✓ (i) Promoting the development of commissions for arbitration or conciliation, whether in commercial or consumer cases.

2001-2008 Initiatives

- Law 366 Oct. 3, 2001: reform of the corporate law. Entered into force on Jan. 1, **2004**, authorized the Italian Government “to provide forms of **conciliation of civil disputes related to company law**, including disputes brought before private bodies and entities [...]”
- Two distinct and overlapping systems of ADR in the **financial services sector** were put in place in **2007-2008**:
 - ① a procedure administered by CONSOB (Italy’s equivalent of the Securities and Exchange Commission or OJK) for retail customer claims against financial services providers, and
 - ② a procedure administered by the Bank of Italy to ensure transparency in banking services.

Law 69/2009

- **2009-2010:** the Italian legislature implemented the EU Directive 2008/52/EC with a national Law No. 69/2009. The Law delegated a mandate to the Government to introduce a regulation of civil and commercial mediation. The Government fulfilled it by Legislative Decree 28/2010, which introduced mandatory pre-trial mediation of civil and commercial cases.

This legislation introduced in Italy the first comprehensive mandatory approach to mediation

The Italian Implementation: Legal Background

EU Directive 2008/52/EC



National Law No. 69/2009



Legislative Decree 28/2010

Italian Implementation

- This legislation introduced in Italy is the **first comprehensive approach to mandatory mediation**, covering both cross-border and domestic disputes, only applying to claims involving rights which can be freely disposed of by the relevant parties (so-called "*diritti disponibili*").
- The Decree introduced a mandatory preliminary mediation procedure which applies before any litigation to various matters, including: insurance, banking and financial agreements, and other matters such as joint ownership, property rights, division of assets, leases in general, gratuitous loans, compensation for damages due to car accidents (later on exempted by a new regulation), medical liability or defamation.

Italian first reactions

- a. Before the Legislative Decree came into effect (on March 21, **2011**), the Italy's National Lawyers' Union (*Organismo Unitario dell'Avvocatura*) called for a week of **national strike**.
- b. On December 6, **2012**, the Italian **Constitutional Court froze the program**, ruling that the decree 28/2010 did not comply with the Constitution.

Law 98/2013 – What's new

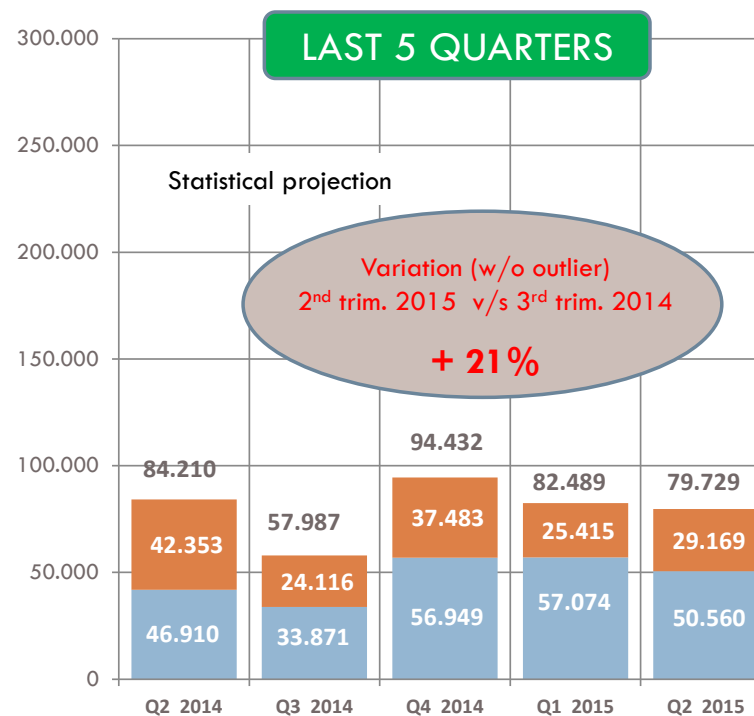
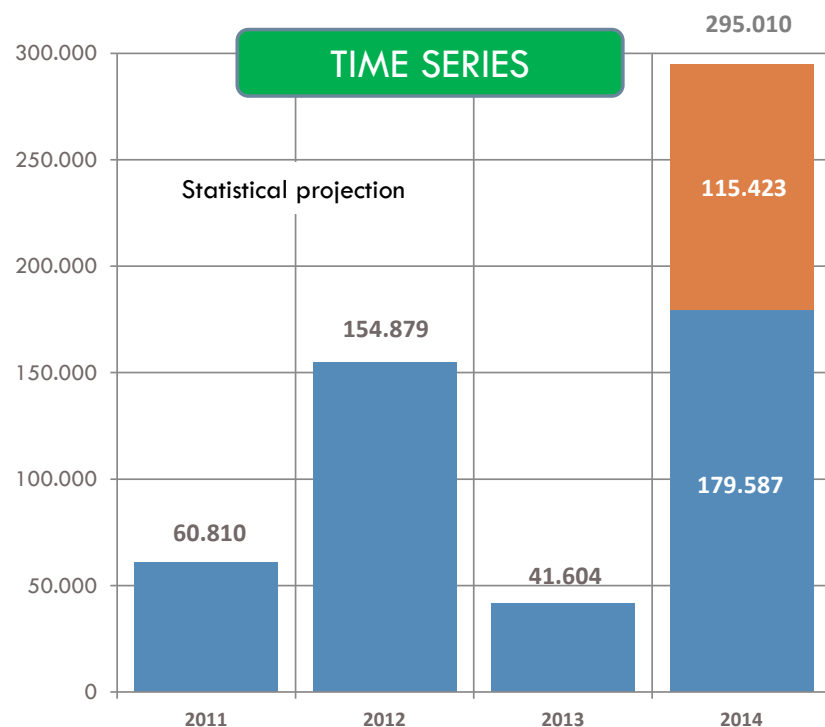
- September 20, 2013, a new regulation came into effect (Law 98/2013), again opting for mandatory mediation but with significant modifications:
 - ① Pre-trial mediation remains compulsory in a listed category of cases, but **the list has been narrowed**
 - ② **Introduced the opt-out system**, along with a “**penalty**” about the **mediator proposal**
 - ③ **Role of attorneys**: imposes a strict duty on lawyers to inform clients about the option of mediation and to try the mediation option. It also requires that counsel assist parties in mediation.
 - ④ **Mediators qualifications**: introduced detailed legal rules addressing mediator training and accreditation.

Statistics January 1st – June 30th 2015

Released by the DG Stat of the Ministry of Justice of Italy (Sept 2015)

Incoming mediations

March 2011 – June 2015



In the comparison between years, it has to be taken into account that:

- From 13 December 2012 to 30 September 2013 the compulsory attempt at conciliation was suspended;
- In 2012 there were approximately 45,000 mediations (an average of 11,165 per quarter) for damages from circulation of vehicles and boats, this subject matter is no longer mandatory as of September 20, 2013

■ Incoming mediations

■ Incoming mediations for one mediation firm, statistical «outlier»

Responding firms in 2nd quarter 2015

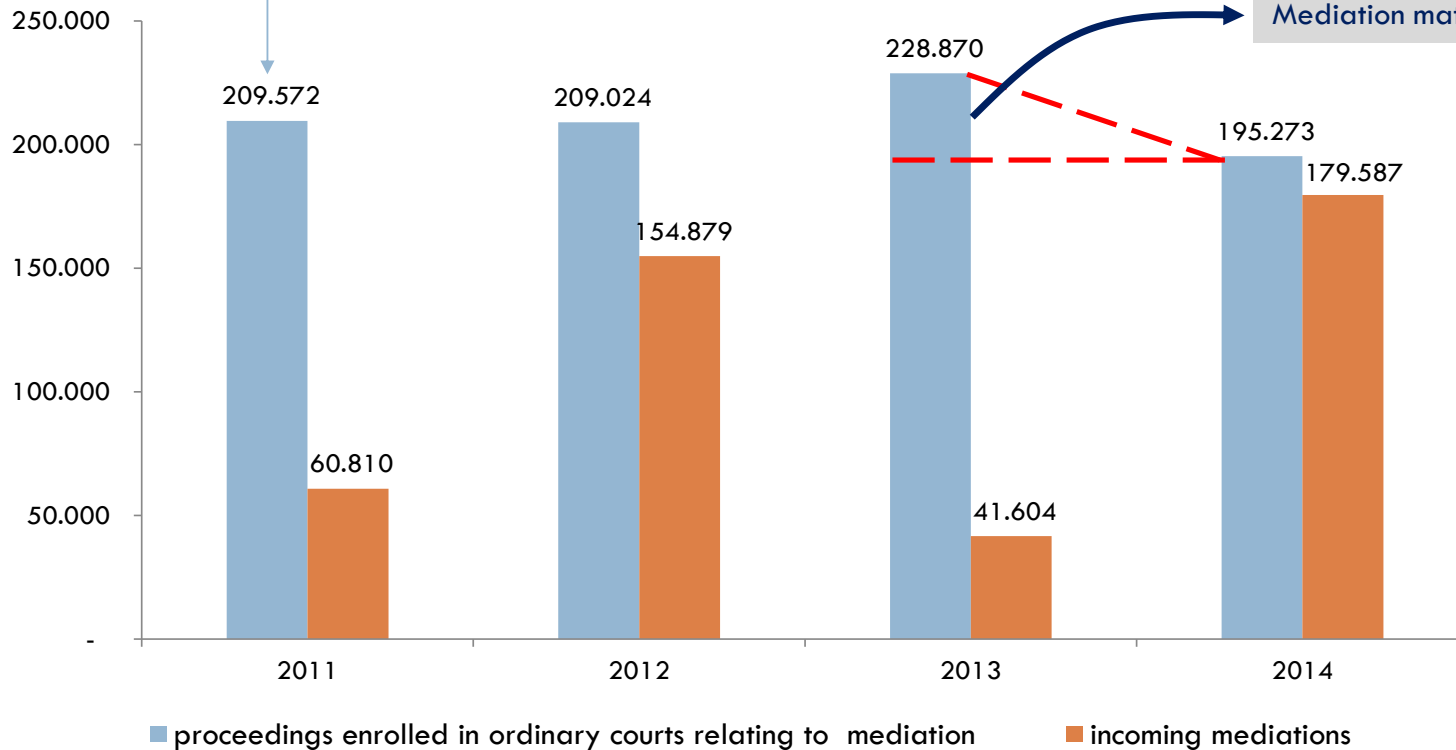
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Comparison between mediation cases and court cases

2011 – 2014

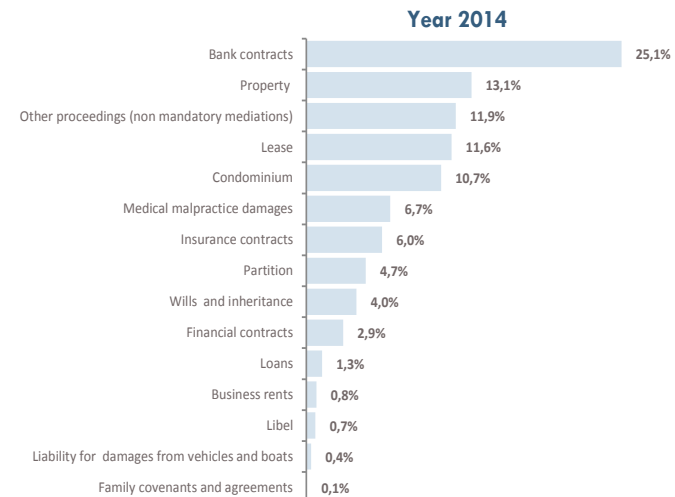
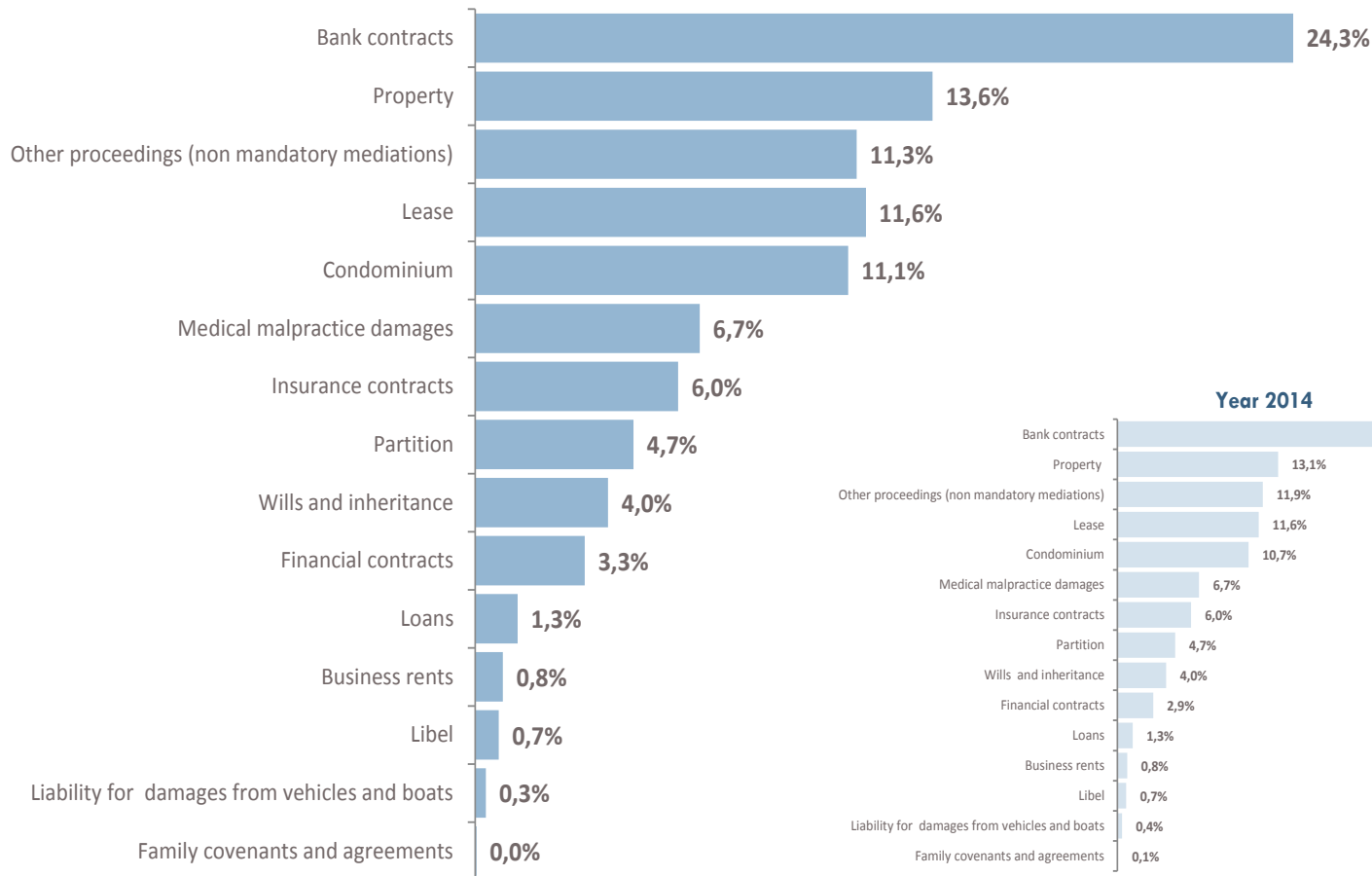
The proceedings enrolled in the ordinary courts relating to matters for which a mediation attempt is compulsory represent nearly 8% of the total civil cases registered in Italian tribunals each year.

Reduction
2014 vs 2013
Civil Total = -8%
Mediation matters = -15%



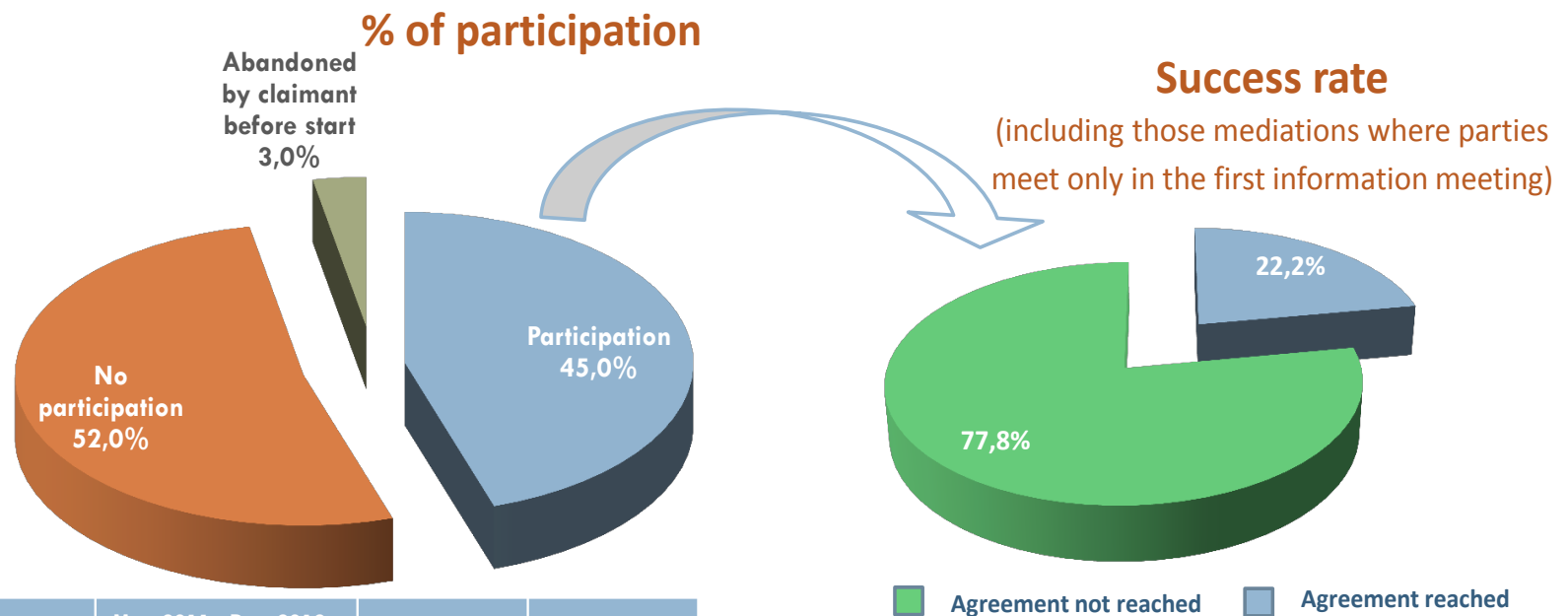
Incoming mediations by subject

1st semester 2015



Success rate

1st semester 2015



	Mar. 2011 - Dec. 2012	2013	2014
Participation	27,0%	32,4%	40,5%
Success rate	43,9%	42,4%	47,0% (*)

A sample analysis shows that the success rate goes up to 43,1% when parties go further in the mediation attempt after the first information meeting

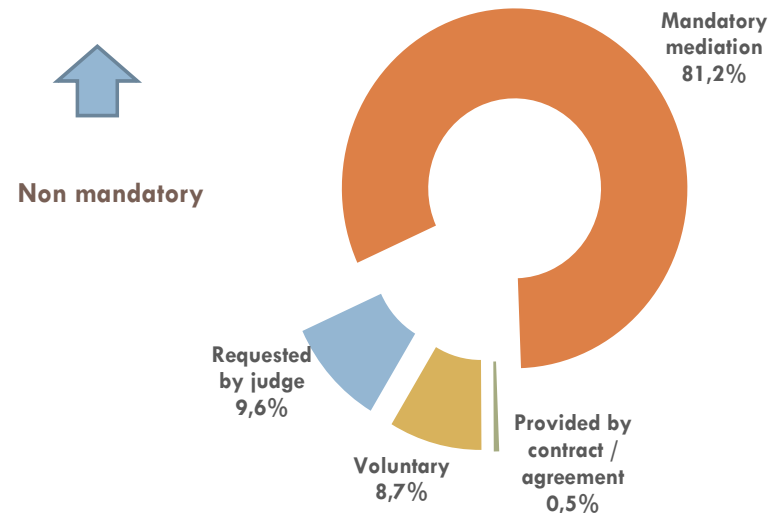
(*) Excluding mediations in which parties participated only in the first information meeting

Categories of mediation – resolved cases

1st semester 2015

	2011		2012		2013		2014	
Judicial referral	700	1,7%	4.965	3,3%	489	2,0%	7.699	5,6%
Mandatory mediation (2011-2012)								
Mandatory Mediation with easy opt-out at the initial meeting (from end 2013)	31.288	77,9%	129.531	84,9%	13.802	57,5%	131.360	83,8%
Provided by contract / agreement	200	0,5%	458	0,3%	359	1,5%	1.332	0,6%
Voluntary	7.973	19,9%	17.677	11,6%	9.369	39,0%	15.926	10,0%

1st semester 2015



Days in mediation compared to days in Court

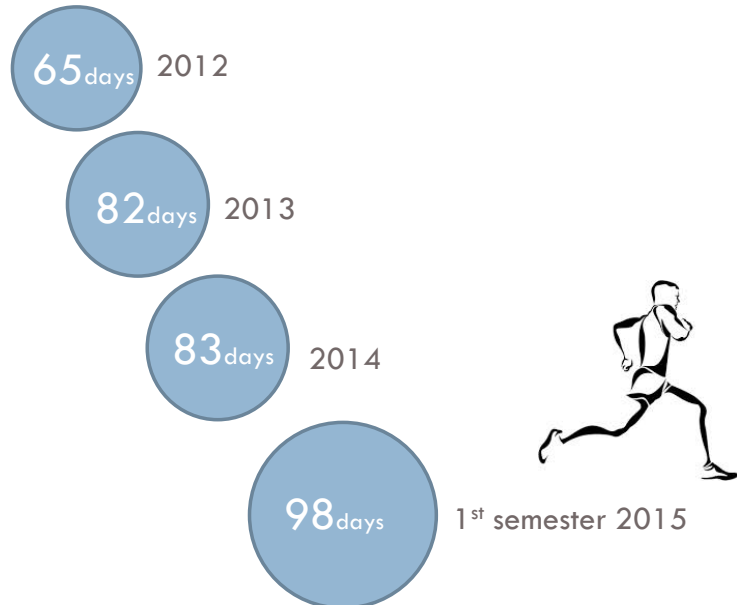
CIVIL CASES IN COURTS



Litigious
cases in
2013

MEDIATION

Cases when an agreement is reached



Conclusion

- a) It's evident that mediation is now a permanent fixture on the dispute resolution landscape, then legal practitioners and parties would benefit from becoming acquainted with such procedures so that they can apply them where appropriate.
- b) Mandatory mediation is not necessarily an oxymoron when used with circumspection.
- c) Despite all controversies and changes of regulations in the Italian scenery, its mediation model might now once again inspire a number of other countries unsatisfied with the slow development of mediation practice.
- d) Mandatory mediation ultimately has to be complemented by education and other steps to increase the general awareness of mediation in the society. Changes implemented by Italy will only be effective if they are complemented by the education of legal professionals and the training of a large number of mediators to handle both consciously and professionally the inevitable increase in claims.