THE AMERICANIZATION OF THE ITALIAN CIVIL PROCEEDINGS?

CESARE CAVALLINI & STEFANIA CIRILLO*

I. INTRODUCTION

This Article seeks to address the question of whether the recent and pivotal Italian civil justice reform bears any

* Cesare Cavallini is a Full Professor of Law at Bocconi Law School, Milan, Italy. Stefania Cirillo is a Research Fellow also at Bocconi Law School. Professor Cavallini presented a version of this Article at the discussion held at Bocconi University on May 13, 2023. He took the lead in preparing Sections II.B, II.D and, Section III; Cirillo took the lead with the Introduction, Section I, Section II.A and II.C. The Article overall reflects a true collaboration of the two authors.

resemblance to the American civil proceeding framework, both in its technical aspects and in broader perspective. The answer yields interesting insights about the methods for comparing legal systems, particularly relating to procedural and policy issues.

On May 5, 2021, the Italian Government drafted the National Recovery and Resilience Plan (NRRP) in response to the European Union's program to provide member nations with billions of dollars of assistance to meet the problems that followed the COVID-19 pandemic.[1] The NRRP acknowledged civil justice reform as one of the main strategic tools that could address these problems and benefit individuals, businesses, and society. The inclusion of civil justice reform in the NRRP was justified by the inefficiency of the Italian justice system, including civil proceedings, which harmed businesses and society at large.[2] The pandemic did not cause this problem, but it exacerbated long-standing and systemic defects, most notably the unreasonable length of time taken for courts to issue a final decision. Nor was the NRRP the first effort to deal with the problem.

The current Code of Civil Procedure in Italy was framed in 1942,[3] and conformed to the traditional Continental, or

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1. On May 5, 2021, Italy presented the National Recovery and Resilience Plan (NRRP) as part of the Next Generation EU (NGEU) program, namely the €750 billion package that the European Union negotiated in response to the pandemic crisis. The NRRP envisages investments and a consistent reform package. The NRRP is available at the official website, "Italia Domani," created by the Italian government to provide news on its implementation of the reform. ITALIA DOMANI, THE NATIONAL RECOVERY AND RESILIENCE PLAN, https://www.italiadomani.gov.it/en/strumenti/documenti/archivio-documenti/national-recovery-and-reslieince-plan.html (last visited Oct. 22, 2024) [hereinafter Official NRRP]. See also the English language summary of the NRRP, available on the Italian Ministry of Economy and Finance official website at *The National Recovery and Resilience Plan (NRRP)*, MINISTERO DELL'ECONOMIA E DELLE FINANZE, https://www.mef.gov.it/en/focus/The-National-Recovery-and-Resilience-Plan-NRRP/ (last visited Oct. 22, 2024).

2. The data published in the 2023 EU Justice Scoreboard by the European Commission demonstrates that Italy has consistently ranked among the EU countries with the longest estimated time needed to resolve civil, commercial, administrative, and other cases from 2012 to 2021. EUROPEAN COMMISSION, THE 2023 EU JUSTICE SCOREBOARD 11 (2023), https://commission.europa.eu/document/download/db44e228-db4e-43f5-99ce-17ca3f2f2933_en?filename=Justice%20Scoreboard%202023_0.pdf.

3. The main reform of Italian civil procedure is dated 1990, but many others have followed since then, all devoted to the same purpose: reducing

European, framework of a judge-centered system in which the judge plays an active role governing the parties' activities.[4] Since the end of the 20th century, Italian lawmakers have attempted to reform many of the Code's rules. Although reforms did not attempt to change the comprehensive structure of Italian civil proceedings, they did try to address some of the inefficiencies of the system. However, with time, the pressing need for revolutionary change became clear.

The growing number of complex and multiparty civil disputes, economic evolution, and the generally increased tendency for litigation have caused an explosion in the number of claims brought before the Italian courts.[5] Moreover, the policy of safeguarding the traditional judicial structure, especially in terms of maintaining a small number of judges and raising barriers to the use of alternative dispute resolutions (ADR), has exacerbated the system's inefficiency and contributed to a substantial decrease in the quality of decisions.[6] As with previous

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the length of the civil proceedings, either at the first instance or specifically regarding access to the Court of Appeal and the Italian Supreme Court. The more significant are dated 2005 and 2012, but they were mostly unsuccessful. *See* Vincenzo Varano, *Civil Procedure Reform in Italy*, 45 Am. J. Comp. L. 657 (1997) (providing an overview of the 1990-1991 reforms and their most important aspects); Remo Caponi, *The Performance of the Italian Justice System: An Empirical Assessment*, 2 Italian L.J. 15, 22, 28 (2016) (listing the legislative changes that have been attempted since 2012).

4. The Italian system belongs to the group of civil procedure systems defined as inquisitorial or non-adversarial. As is characteristic of these systems, there is an activist judge who conducts the proceedings and intervenes to ensure a solution based on the merits of the case. On the contrary, adversarial systems are characterized by party-controlled procedures, and a neutral judge concerned predominantly with the integrity of the process. *See generally* Franklin Strier, *What Can the American Adversary System Learn from an Inquisitional System of Justice*, 76 Judicature 109 (1992) (comparing the characteristics of inquisitorial and adversarial civil procedure systems); Cesare Cavallini & Stefania Cirillo, *Reducing Disparities in Civil Procedure Systems: Towards a Global Semi-Adversarial Model*, 34 Fla. J. Int'l L. 99 (2022) (discussing Italian Civil Procedure reforms as an example of the semi-adversarial model).

5. *See Monitorraggio della giustizia civile [monitoring of civil justice]*, It. Ministry of Just., https://www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST1287132# (last visited Jan. 17, 2025) (providing graphical representation on the number of civil claims brought before Italian courts from 2003 to 2024).

6. For other data number of judges of the Italian system see Cesare Cavallini & Stefania Cirillo, *The Judge Posner Doctrine as a Method to Reform the Italian Civil Justice System*, 2 Cts. & Just. L.J. 8, 41 (2020).

reforms, the current effort focuses on the need to address the system's inefficiency, characterized by its delayed and protracted processes.

The current plan proposes to reduce the duration time of civil cases by *forty percent in five years*.[7] The Italian government addressed this daunting task through several measures beginning with the Law no. 206 passed on November 25, 2021,[8] along with relevant implementing decrees (i.e., Legislative Decrees No. 149/2022, 150/2022, and 151/2022)[9] (together, hereinafter, "Reform"),

Generally speaking, civil justice reform requires interrelated measures in order to be effective. One area of reform is centered on organization of courts and professional training for lawyers and other actors in the system.[10] Another area relates to the civil proceeding itself, prescribing new roles and activities for judges and lawyers. For example, one such rule expands the judge's responsibility in the first hearing by, *inter alia*, requiring her to attempt conciliation between the parties, as we will describe in the following paragraphs IB and IC. Combined, these two types of reforms (i.e., reforms affecting

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7. Official NRRP, *supra* note 1, at 99.

8. This Law is an enabling act (Legge Delega). Parliament delegates the exercise of the legislative function to the Government by fixing specific and clear principles and criteria to which the Government must adhere. Then the Government exercises the legislative function by the so-called Legislative Decree(s). Legge 25 novembre 2021, n.206, G.U. Dec. 9, 2021, n.292 (It.).

9. The Legislative Decree No. 149/2022 concerned regulations related to the revision of civil proceedings and alternative dispute resolution instruments. Decreto legislativo 10 ottobre 2022, n.149, G.U. Oct. 17, 2022, n.243 (It.). Legislative Decree No. 150/2022 focused on rules to enhance the efficiency of the criminal process. Decreto legislativo 10 ottobre 2022, n.150, G.U. Oct. 17, 2022, n.243 (It.). Furthermore, Legislative Decree No. 151/2022 addressed rules regarding structural changes, specifically the establishment of the Office of the Trial (Ufficio del Processo) that aims to enhance the justice system through improvements and technological innovations. Decreto legislativo 10 ottobre 2022, n.151, G.U. Oct. 17, 2022, n.243 (It.). These rules are now embodied in the Italian Code of Civil Procedure, Codice di procedura civile (It.), and in the Laws governing mediation (Legislative Decree No 28/2010), Decreto legislativo 4 marzo 2010, n.28, G.U. Mar. 5, 2010, n.53 (It.) [hereinafter, the Italian Legislative Decree on Mediation], and negotiation (Law No. 162/2014), Legge 10 novembre 2014, n.162, G.U. Nov. 10, 2014, n.261 (It.) [hereinafter the Italian Law on Assisted Negotiation].

10. *See* Cavallini & Cirillo, *supra* note 6, at 43–44 (providing that a serious reform of the process in Italy must include analysis of systems of access and career advancement among other considerations).

organization of the court/professional training and related to the civil proceeding itself) can shorten the length of the dispute and improve the quality of decisions.[11]

The great virtue of the Reform is that it includes measures aimed at addressing the structure of both the judiciary system and civil proceedings. In this Article, we focus on the Reform's structural amendments to civil proceedings, which alter the traditional pattern of Italian civil procedure. In particular, we focus on changes (i) supporting and favoring ADR; (ii) conferring a new role for lawyers in the process of determining facts and evidence as a part of the newly-established process for negotiation and out-of-court discovery; (iii) giving first hearings a new role; (iv) incentivizing parties to settle their disputes ("judicially-led settlement"); and (v) introducing new forms of summary adjudication.

Arguably, these amendments have reshaped Italian proceedings so that they resemble federal pretrial practices in the U.S. system, narrowing the broad and long-debated gap between adversarial proceedings, mainly ascribed to common law systems, and inquisitorial proceedings, mainly ascribed to civil law systems.[12] However, our title, namely "Americanization," does not refer to a mere technical comparison. It tries to engage in an analysis based on the search for shared values and cornerstones between the Reform and American civil procedure and

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11. It is worth mentioning that economics scholars frequently approach the issue of efficacy and efficiency of civil justice in these terms. *See generally* OECD, *What makes civil justice effective*, OECD Economics Department Policy Notes, Jun. 18, 2013, at 4, https://web-archive.oecd.org/2013-06-20/238744-Civil%20Justice%20Policy%20Note.pdf.

12. For the distinction between the dichotomy see e.g., Franklin Strier, *supra* note 4, at 109. *See also* John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. Chi. L. Rev. 823, 823–24 (1985) (claiming that a "lawyerless" system would be worse); Mirjan R. Damaška, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process 3–6 (1986) (providing an overview of the differences between inquisitorial and adversarial systems) [hereinafter The Faces of Justice]; Mirjan R. Damaška, Evidence Law Adrift, 2–4 (1997) (comparing the analytical approaches in the adversarial and inquisitorial systems); Michele Taruffo, *Aspetti fondamentali del processo civile di common law e di civil law*, 36 Revista da Faculdade de Direito da UFPR 27, 32 (2001) (comparing the model or typical form of the trial process between common and civil law systems); Oscar G. Chase et. al., Civil Litigation in Comparative Context 3–4 (West Academic, 2d ed. 2017) (offering overviews of the major common law and civil law systems and making general comparisons between them).

to understand the value of pursuing a legal transplant. While the focus of our discussion turns on how the Reform has incorporated significant elements of U.S. civil procedure, we also examine the convergence of the two systems from the other direction, in particular, exploring how developments in American civil procedure has left it not purely adversarial. Given the difference between these two systems and growing criticisms within the American civil legal system, understanding these backdrops may prove critical to the success of the Reform.

This cross-comparison sheds light on a new avenue for comparative studies in international civil justice and procedure. Part II provides a technical overview of the key provisions of the Reform. Part III compares these changes with the cornerstones and tools of U.S. federal civil procedure. Part IV concludes with a broader assessment of the Americanization of the Reform, examining its impact on both systems in terms of methodology and outcomes.

Three other preliminary remarks are in order—all of which relate to use of the term "Americanization." First, one might perceive "Americanization" as a technical process whereby the U.S. system influences another system leading to its adaptation. However, this is not the sense in which we use the term "Americanization." Instead, we offer it as a provocative concept and as a basis for reflection. This use arises from recognizing certain similarities between the Italian and American systems. These similarities indicate a shared value framework and suggest the existence of common foundational principles. For example, elements such as orality, immediacy, concentration, and the independence of judges are inherent to both systems.[13]

Second, we use the term "Americanization" to prompt a discussion and as a warning not to make hasty assumptions about transplantation and conformity. For instance, as our discussion

13. *See*, GIUSEPPE CHIOVENDA, ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE, 371–72 (1934). More specifically, the principle of concentration indicates that a case should be treated in a single hearing or in a few closely spaced oral sessions before the court, carefully prepared through a preliminary stage in which writings were not necessarily to be included. The principle of immediacy refers to a direct, personal, open relationship between the adjudicating organ and the parties, the witnesses, and the other sources of proof. Finally, the principle of orality means an efficient, swift, and simple method of procedure, based essentially on an oral trial in which the adjudicating body is in direct contact with the parties (not only with their counsel) and the witnesses.

of mediation will show, a shared set of legislative aims can be implemented very differently.

Finally, we use the term "Americanization" to emphasize that implementation of the Reform must be cautious and avoid replicating the pitfalls encountered by similar institutions within the American system, such as those related to summary judgment, as we will explore in Part III-D. This requires a candid assessment of the drawbacks associated with such institutions.

II. The 2022 Italian Civil Justice Reform: The Essentials

This Part provides a technical overview of the main aspects of the Reform. These technical features form the basis from which we carry out our examination of whether the Reform reflects an "Americanization" of Italian civil proceedings. The amendments largely focus on the early stages of a lawsuit, setting conditions for coming into court and creating new roles for both lawyers and judges that encourage a more timely and expeditious resolution of the dispute.

A. *The Impact on the Use of Mediation and Negotiation*

The Reform significantly affects the relationship between ordinary adjudication and the Italian system's use of alternative dispute resolution methods. In particular, the Reform calls for encouraging and even mandating the use of mediation and negotiation under certain circumstances.[14] These aspects of the Reform are intended to strengthen the use and effectiveness of ADR as a way to reduce judicial backlog and bring redress to parties in a timelier manner.[15]

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14. *See* Italian Legislative Decree on Mediation, *supra* note 9; Italian Law on Assisted Negotiation, *supra* note 9. For a translation of the mediation law in the version before the 2022 reform, see also Leonardo D'Urso & Romina Canessa, *The Italian Mediation Law on Civil and Commercial Disputes*, ADR Center (Mar. 2017), https://www.mondoadr.it/wp-content/uploads/The-Italian-Mediation-Law.pdf.

15. See Marta Cartabia, Minister of Justice, It., Hearing on the Recovery Plan at the Chamber of Deputies (Mar. 15, 2021) (audio available at https://webtv.camera.it/evento/17725) (text available at https://dpei.it/wp-content/uploads/2021/03/CARTABIA-LINEE-PROGRAMMATICHE-SULLA-GIUSTIZIA-15-MARZO-2021.pdf) [hereinafter The Reform of Justice Guidelines] (emphasizing the efficiency of alternative dispute resolution and

Critically, the Reform expands the types of litigation that the parties are required to mediate to attempt conciliation before proceeding in litigation.[16] If the parties do not attempt to conciliate, the proceeding is inadmissible in court. The proceeding becomes inadmissible when the court dismisses it due to procedural reasons. In this instance, it would be the parties lack of attempt to conciliate before initiating the legal action. This innovation affects compulsory mediation, court-ordered mediation, and voluntary or conventional mediation.

Specifically, regarding compulsory mediation, the Reform has expanded the range of lawsuits in which parties are obliged to engage in mediation and try to conciliate before commencing the action in court, in particular, to all disputes involving period contracts.[17]

Regarding court-ordered mediation, the Reform retains the prior provision that judges can order the parties to mediate but expands this authority. Now, mediation can be ordered in any circumstance, including during court of appeal proceedings.[18] The judge thus has authority to assess the merits of an existing and ongoing dispute to determine whether mediation would be appropriate. As part of the intersection of mediation and court oversight, the Reform has also strengthened court

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the way it compliments traditional legal systems). This concept is inspired on the idea of ADR created by Mauro Cappelletti. *See* Mauro Cappelletti, *Giudici laici. Alcune ragioni attuali per una loro maggiore utilizzazione in Italia*, 34 RIVISTA DI DIRITTO PROCESSUALE, 698, 707 (1979) (arguing that alternative dispute resolution mechanisms can work in harmony with traditional judicial systems to increase efficiency); Mauro Cappelletti, *Appunti su conciliatore e conciliazione*, 35 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 49, 57 (1981) (noting the benefits of conciliatory forms of ADR in terms of efficiency and minimizing social strife).

16. Compulsory mediation existed in Italy before the Reform as well. For more insights on it see generally Giuseppe De Palo & Romina Canessa, *Sleeping - Comatose - Only Mandatory Consideration of Mediation Can Awake Sleeping Beauty in the European Union*, 16 CARDOZO J. CONFLICT RESOL. 713 (2014).

17. *Compare* Italian Legislative Decree on Mediation, D.Lgs. 180/2010, Art. 5, para. 1-bis (It.) *with* New Italian Legislative Decree on Mediation, Decreto Legislativo 10. ottobre 2022, n.149, G.U. Oct. 17, 2022, n.243, Art. 5, para. 2). Before the Reform the compulsory mediation was provided for those disputes concerning a matter of joint ownership, real estate, partition, inheritances, family covenants, lease, bailment, business lease, damages for medical malpractice or defamation via the press or any other means of publicity, insurance, bank and financial contracts.

18. Italian Legislative Decree on Mediation, *supra* note 9, at the Art. 5-quater.

mechanisms for tracking cases that are assumed to be more amenable to mediation[19] and mechanisms to train judges in their conciliator skills.[20] Moreover, the Reform has introduced a reward system that connects the career evaluation of judges to the number of mediations they order.[21]

Finally, the Reform also affects changes to voluntary or conventional mediation, where parties have privately agreed to mediation before commencing a lawsuit. In particular, the Reform has extended this possibility to be included in contracts with and bylaws of public entities.[22]

The Reforms also generally incentivizes positive outcomes from mediation. The Reform authorizes economic sanctions on parties in the event that mediation fails[23] and allows for procedural sanctions in response to a party's behavior in mediation.[24]

Additionally, the new provision on the so-called 'technical expertise in mediation' departs from certain confidentiality norms. The Reform allows for a mediating expert's findings to be admissible in later judicial proceedings if the mediation is unsuccessful and the parties granted their consent at the time of the expert's appointment.[25]

The Reform also encourages the use of ADR through one of its most remarkable innovations – istruttoria stragiudiziale (out-of-court discovery) – which gives lawyers the opportunity during negotiation to question parties or witnesses on specific facts relevant to the claim.[26] According to this new rule, the questions posed by the lawyers to witnesses or the parties, along with the relevant answers and statements, may be recorded in a document. If the negotiation fails and the parties then bring the dispute before the court, the Reform allows the use of this information for the case or claim between the same parties dealing with the same facts.

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19. *Id.* at the Art. 5-quinquies, para. 3.
20. *Id.* at para. 1.
21. *Id.* at para. 2.
22. *Id.* at Art. 5–sexies.
23. *Id.* at Art. 12-bis, paras. 2 & 3; Art. 13.
24. *Id.* at Art. 12-bis, para. 1. More specifically, this section stipulates that if a party unjustifiably fails to participate in the initial mediation meeting, the judge may draw adverse inferences in the subsequent trial under Art. 116, para. 2 of the Italian Code of Civil Procedure.
25. *Id.* at Art. 8, para. 7.
26. Italian Law on Assisted Negotiation, L. n.162/2014, Art. 4–bis and Art. 4–ter.

The Reform has also simplified ADR, such as allowing counsel to conduct mediation or negotiation sessions electronically, rendering ADR more accessible.[27]

B. *The New First Hearing*

The Reform confers a role on the first hearing that is entirely new to the scheme of Italian procedure and diverges from the traditional Continental framework. Prior to the Reform, the Italian proceeding was not structured into a pretrial and trial phase. Parties could present facts and evidence from the outset of the proceeding within certain time limits. The proceeding began with introductory pleadings, followed by a first hearing. At that first hearing, parties could ask to submit three additional pleadings (and the judge almost always gave the requisite permission).[28]

In the first of these pleadings, to be submitted within 30 days of the judge's order, the parties could specify or modify their claims and defenses. In the second pleading, to be submitted within 30 days from the first pleading's expiration date, the parties could respond to the other sides' positions as stated in the first pleading and make a final request the court for additional, new evidence. In the third pleading, to be submitted within 20 days from the second pleading's expiration date, the parties could request to the court to submit counter-evidence that challenges the evidence alleged by the other party in the second pleading. These pleadings defined the boundaries of the controversy with respect to the facts, documentary evidence, and requests for non-documentary evidence.

In practice, the first hearing was "vacuous": lawyers formally appeared simply to request permission to file the three pleadings, and they rarely discussed the claim.[29] The trial became largely 'written' as the parties depended solely on written

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27. Italian Legislative Decree on Mediation, No. 28/2010, Art. 8–bis; Italian Law on Assisted Negotiation, L. n.162/2014, Art. 8–bis.

28. *See* the old Italian Code of Civil Procedure § 183, para. 6, no. 1–3 (listing the three time limits parties could request at the first hearing). For a translated version of the old code, see Simona Grossi & Cristina Pagni, Commentary On The Italian Code Of Civil Procedure 203 (2010).

29. *See* Cesare Cavallini, *Verso il nuovo modello del procedimento ordinario di cognizione*, 77 Rivista di diritto processuale 161, 161 (2022).

pleadings for argumentation and defense, instead of holding oral arguments in hearings.

The Reform changes the role of the first hearing by transforming it into the primary tool for discussing the claims and ensuring the judge oversees it with an eye toward addressing the merits of the dispute, including through judicial-settlement or summary adjudication.[30] To this effect, the Reform requires the parties to establish the *thema decidendum et thema probandum* ("the matter to be decided and the matter to be proven") before the first hearing takes place.

More specifically, the Reform imposes procedural obligations on the parties that must be completed prior to that hearing. First, the plaintiff must prepare and serve a complaint that contains a clear and specific statement[31] describing the subject of the claim. Second, the defendant must respond by preparing and serving a complaint that likewise contains a clear and specific statement that responds to the plaintiff's claim.[32] Then, the parties must file the three pleadings as discussed, except before—not after—the first hearing.[33]

Thus, under the Reform, the first hearing is held—and the judge enters the scene and acknowledges the boundaries of the lawsuit—only after the parties have filed their pleadings. At this hearing, the litigation might have several outcomes, which is possible because the judge will have obtained a comprehensive view of the facts, the parties' arguments, and the evidence requests, along with all the written records, contracts, reports, and other documentation that support each parties' claims.

One option is that the judge schedules hearings to question the witnesses and the parties after determining the admissibility and relevance of the parties' oral evidence requests.[34] Another option is a judicial settlement between the parties.[35] Alternatively, the judge, upon parties' requests, may opt for summary adjudication[36] or, if the case is ready for a decision,

30. Codice di procedura civile, Art. 171–bis and Art. 171–ter (It.).
31. *Id.* at Art. 163.
32. *Id.* at Art. 167.
33. *Id.* at Art.171–ter.
34. *Id.* at Art. 183, para. 4.
35. *See infra*, Section I.C. of this Article.
36. *See infra*, Section I.D. of this Article.

proceed to the ordinary adjudication phase, which involves a final exchange of briefs between the parties.[37]

C. *Judicially Led Settlement*

Prior to the Reform, parties could request that the judge lead them through an in-court settlement. Further, the judge themselves, absent a request by parties, could order a hearing to initiate such a settlement.[38] More specifically, a provision titled "the conciliation attempt" provides that the judge, upon request of the parties, must schedule a hearing to discuss the possibility of settlement.[39] Moreover, under another provision 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. However, this power is conditioned on certain aspects of the lawsuit: the judge may propose a conciliation only if the type and the value of the dispute are appropriate for it and the subject of the lawsuit allows easy and prompt legal solutions.[40]

The Reform affected the in-court settlement in two respects. First, it issued another provision according to which the parties must personally, as opposed to just their counsel, participate in the first hearing to allow the judge to attempt to mediate a settlement.[41] The judge can draw a negative inference from the party's nonappearance.[42] This amendment therefore made the

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37. Codice di procedura civile, Art. 183, para. 2; Art. 187 (It.).

38. For the sake of clarity, in-court settlement refers to the agreement that the parties set out during the civil process in the presence of a judge, which is apt to resolve the dispute, totally or partially. For an in-depth analysis on the matter see generally Cesare Cavallini & Stefania Cirillo, *In Praise of Reconciliation: The In-Court Settlement as a Global Outreach for Appropriate Dispute Resolution*, 2023 J. OF DISP. RESOL. 52.

39. Codice di procedura civile, Art. 185.

40. *Id.* Art. 185–bis. For some reflections on this rule see generally Alberto Tedoldi, *Iudex Statutor Et Iudex Mediator: Proposta Conciliativa Ex Art. 185 Bis C.P.C., Precognizione E Ricusazione Del Giudice*, 70 RIVISTA DI DIRITTO PROCESSUALE 983 (2015) (examining specific several aspects related to Article 185-bis of the Code of Civil Procedure, focusing particularly on the potential risk that the judge's proposal could compromise judicial impartiality).

41. Codice di procedura civile, Art. 183, para. 1.

42. *Id.* at Art. 116, para 2. According to Italian law the judge might use the so called "argument in evidence" to evaluate other evidence. More specifically, the term "argument in evidence" refers to a fact that, while not

judge's settlement attempt compulsory.[43] Second, the Reform allows the judge to make a settlement proposal in the final phase of litigation.[44] During this phase, final decisions may be made by the same judge who presided over the first hearing, or by a panel of three judges, one of whom served as the presiding judge at the first hearing.

D. *The New Summary Adjudication*

Finally, the Reform introduced two forms of summary adjudication, both of which allow for the trial to be terminated early.[45] The judge can pursue either form of summary adjudication upon either party's request after the party has met its procedural requirements. Consideration of the motion is treated as an interim measure proceeding. Despite a complete evaluation by the judge on the merits, a summary adjudication, even if it is final since it concludes the lawsuit, is not formally considered *res judicata*.

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possessing direct evidentiary value, provides elements that assist in evaluating other evidence. These elements may include clues or circumstances, which are typically regarded as simple presumptions in terms of their effectiveness. The parties' behaviors during the lawsuit might be considered as an argument in evidence. For the case of the in-court settlement the judge might consider as a negative argument in evidence the non-appearance of the party to the first hearing, in case the conciliation fails and the judge goes to adjudicate.

43. *See* Cesare Cavallini, Lezioni di Diritto Processuale Civile 503 (2022) (Explaining that the compulsory conciliation attempt had a troubled path. Law number 353 of November 26, 1990, made a conciliation attempt by the judge compulsory and, to this purpose, required the personal appearance of the parties at the first hearing. With Law no. 80 of May 14, 2005, the compulsory conciliation attempt at the first hearing was repealed because it was considered unsuccessful. However, in order to enhance the ADR mechanism, the Reform reintroduced it.). For other reflections on the compulsory conciliation attempt see also Paolo Biavati, *Conciliazione strutturata e politiche della giustizia*, 3 Rivista trimestrale di diritto e procedura civile 785 (2005).

44. For an in-depth analysis of the possibility for the judge to make a proposal, especially in a comparative perspective with U.S. system, see Antonio Carratta & Cesare Cavallini, *Judicial settlement e modelli di tutela a confronto*, 2 Rivista Trimestrale di Diritto e Procedura Civile 427, 436, 437, 438, 439, 440, 441 (2022); For the possibility for the judge to make a proposal in the final phase of litigation see Silvana Dalla Bontà, *Fra mediazione e decisione. La riforma apre ad un nuovo paradigma di giudice?*, 1 Rivista Trimestrale di Diritto e Procedura Civile, 21, 26 (2023).

45. Codice di procedura civile, Art. 183–ter; Art. 183–quarter.

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

The second type of summary adjudication allows for the judge, at the end of the first hearing, to reject the claim in two situations: if the plaintiff's claim has no real prospect of victory, due to the unquestionable facts and documentary allegations in favor of the defendant, or if the relevant pleading is null and void.[47] The defendant must move for this form of summary adjudication.

The goal of these orders is to allow litigants to avoid the expenses and delays that accompany protracted trials based on non-controversial factual bases. However, as noted, these summary resolutions do not carry *res judicata* effect.[48] Consequently, the same claim might be relitigated between the same parties in a separate action.

III. What about Americanization?

This Part moves from the technical description of the Reform to a critical analysis of its commonalities with and differences from procedures associated with federal civil litigation in the United States. In particular, we will describe (A) the diverse approaches that we consider adequate to implement mediation and negotiation in both systems; (B) the commonalities between the American pre-trial phase and the Italian introductory phase of a lawsuit; (C) the more appropriate structure of the new Italian judicially-led settlement method compared to the American one; (D) the drifts of the implementation of the American summary judgment in Italy.

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46. *Id.* at Art. 183–ter.

47. *Id.* at Art. 183–quater.

48. Davide Turroni, *La definizione anticipata del giudizio – Artt. 183-ter e 183-quater c.p.c.*, 2023 Giurisprudenza Italiana 454, 455 (Feb. 2023).

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

The Reform has significantly amended laws governing mediation and negotiation, strengthening and mandating their use in a variety of contexts. These amendments align with the overall direction of the Reform, which aims to delegate dispute resolution functions that are not constitutionally assigned to the judiciary to other decision makers wherever feasible.[49] This approach builds on the idea that Article 102 of the Italian Constitution[50] reserves exclusively for the judge the exercise of the judicial function, such as determining the existence or absence of a right (i.e. declarative justice).[51] Although the Reform emphasizes the judge's role in delivering declarative justice, it rejects the notion that ADR methods fail to offer a form of justice that is compatible with the Italian constitutional design.[52]

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49. For further detail, see generally the government Report on the Reform. D.Lgs. *Introduzione,* Legisl. ital. II Aug. 2, 2022 n. 407 (It.) [hereinafter Reform Report] https://www.senato.it/leg/18/BGT/Schede/docnonleg/45207.htm.

50. Art. 102, para. 1 COSTITUZIONE (It.).

51. *See* VIRGILIO ANDRIOLI, STUDI SULLA GIUSTIZIA COSTITUZIONALE, 502 (1992) (stressing this principle in light of the principle of judicial independence); Giuliano Scarselli, *Note sulla c.d. degiurisdizionalizzazione*, QUESTIONE GIUSTIZIA (Sept. 10, 2015), https://www.questionegiustizia.it/articolo/note-sulla-c_d_degiurisdizionalizzazione_10-09-2015.php (discussing dejurisdictionalization as a mechanism to improve efficiency in dispute resolution without comrpromising fair process); Francesco Paolo Luiso, *Giustizia Alternativa O Alternativa Alla Giustizia*, RIVISTA JUDICIUM (Mar. 21, 2011), https://www.digies.unirc.it/documentazione/materiale_didattico/697_2014_1373_21057.pdf (explaining how the ADRs represent more than methods of alternative justice). Moreover, Italian literature has discussed if certain forms of compulsory ADR, like the compulsory mediation in Italy, are consistent with the Italian Constitution. For a general discussion on the matter, see Andrea Simoncini & Elia Cremona, *Mediazione e Costituzione*, 2022 GIUSTIZIA CONSENSUALE 3, 16–21 (explaining, *inter alia*, that: (i) the proliferation of new constitutional rights makes mediation a form of justice better suited to finding solutions when disputes arise; (ii) the term "justice," as used in Articles 11 and 111 of the Italian Constitution, can also be interpreted as encompassing consensual justice; (iii) Article 2 of the Italian Constitution promotes the principle of solidarity, which aligns more closely with consensual justice than with adjudication; (iv) Article 102 of the Italian Constitution is consistent with the idea that a judge may not only deliver declarative justice but also assist the parties in reaching a consensual resolution).

52. On the contrary, many authors have expressed that justice is better achieved through adjudication rather than conciliation. In their perspective,

The Reform finds good support for this approach in the Italian Constitution. Particularly relevant is the fact that the Constitution does not establish justice as an automatic and inherent extension of jurisdiction.[53] The separation of the two concepts is evident in paragraph 2 of section 111, which addresses "due process" and indicates that the legal process ("trial") and the attainment of justice ("due" or "fair" outcomes) are distinct concepts and should not be collapsed.[54]

There are other indications in the text of the Italian Constitution that the document is meant to separate justice from jurisdiction. This is evident in provisions that promote social cohesion.

Section 2 of the Constitution emphasizes citizens' obligations to fulfill economic and political duties, as well as obligations of "social solidarity."[55] This signifies that the Constitution conceptualizes individuals as not merely bearers of 'justiciable rights' (who consequently have the right to seek judicial protection of those rights through the courts) but also individuals with a responsibility for social solidarity aimed at resolving conflicts. With this constitutional distinction in mind, the Reform moves toward a framework of civil process where conciliation and adjudication are not two heterogeneous phenomena but rather are recognized to be directed to the same purpose – granting justice.

The Reform's emphasis on ADR also recognizes that in practice mediation and negotiation have been undervalued and underutilized, particularly with regards to their ability to

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settling a dispute is merely focused on resolving the conflicting interests of the parties, without necessarily leading to a fair outcome. *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (noting that the purpose of public adjudication is to interpret the values of the constitution and bring reality into accord with them, a goal not advanced by settlement.); Judith Resnik, *Symposium on Litigation Management: Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 552 (1986) (arguing that judicial consent to settlement may not in itself be a sufficient guarantee of fair and quality outcomes); Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 108 (1986) (noting that settlement sacrifices justice in exchange for efficiency and peace).

53. *See* Simoncini & Cremona, *supra note* 51, at 3 (arguing that by promoting the cohesion of the society, mediation represents a tool apt to fulfill the social solidarity obligations delineated by the Italian Constitution).

54. Art. 11 COSTITUZIONE (It.).

55. *Id.* at Art. 2.

avoid the need for civil litigation.[56] While we cannot claim that the Italian system entirely neglected ADR prior to the Reform, the substantial uptick in the use of the practice that one might have expected since its introduction in the justice system did not properly take place.[57]

The new rules on mediation and negotiation strongly reinforce ADR's connection to the judicial process. According to the Minister of Justice's guidelines provided during the hearing on the Recovery Plan at the Chamber of Deputies, ADR should be regarded as a complementary aspect of the justice system rather than a complete alternative.[58] The increased use of ADR is expected to reduce judicial backlog; its use is also expected to have a positive effect on social relationships as it repairs conflicts and reduces social tensions.[59] For those reasons, the Reform clearly promotes ADR by implementing the previously discussed mediation forms that are prerequisites for litigation: compulsory mediation, court-ordered mediation, and voluntary or conventional mediation.[60]

The pinnacle of the complementary relationship between ADR and judicial proceedings is achieved through the introduction of out-of-court discovery during negotiation.[61] The out-of-court discovery during negotiation bears a striking resemblance to pretrial discovery commonly seen in the United States. Notably, the oral evidence collected during negotiations can be integrated into the regular trial process. This changes the nature of negotiations by granting lawyers a role akin to that of judges in our system, including the ability to question

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56. *See* 2023 EU Justice Scoreboard, *supra* note 2 (demonstrating that mediation has not increased much and civil litigation has not decreased much in Italy over the period analyzed).

57. For the data on Mediation and Negotiation in Italy see Direzione Generale di Statistica e Analisi Organizzativa, *Mediazione Civile*, Ministero Della Giustizia, https://webstat.giustizia.it/SitePages/StatisticheGiudiziarie/civile/Mediazione%20Civile.aspx (last visited Oct. 30, 2024). See also the data collected by the Permanent Observatory on the Exercise of Jurisdiction, a body of the National Forensic Council. Osservatorio Nazionale Permanente sull'esercizio della Giurisdizione, *Monitoraggio Negoziazione Assistita*, Consiglio Nazionale Forense, https://www.adrmedyapro.it/Formazione/viewdoc/576 (last visited Oct. 30, 2024).

58. The Reform of Justice Guidelines, *supra* note 15, at 7.

59. *Id.* at 8.

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

61. Italian Law on Assisted Negotiation, L. n.162/2014, Art. 4–bis and Art. 4–ter.

witnesses.[62] It also establishes a direct connection between the negotiation phase and subsequent trial proceedings.

It is well known that the use of mediation and negotiation has increased in the U.S. legal system since their introduction.[63] Professor Frank Sander's ADR proposal at the Pound Conference in 1976[64] is said to be the origin of the "Modern Mediation Movement."[65] His proposal introduced the concept of a "multi-door" courthouse, a reference to creating a system of various alternative dispute resolution avenues in addition to the traditional approach of resolution in court.[66] Mediation was considered an initial step alongside other available options. At the time, the Movement viewed the different doors as separately designed and entailing distinct resolution procedures outside the formal courthouse, constituting a truly private system of dispute resolution or justice.

Much of the enthusiasm about mediation was connected to the belief that it was a distinctly "alternative" process and

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62. See further discussion on this subject in Section II.B1 of this Article.

63. *See* Nancy Welsh, *Bringing Transparency and Accountability (with a Dash of Competition) to Court-Connected Dispute Resolution,* 88 Fordham L. Rev. 2449, 2484 (2020) ("courts' use of dispute resolution has . . . grown[n] and diversif[ied]"). The Author, *id.* at 2455 n. 40, among others, referred to some data collected on statutes, rules, and other information regarding dispute resolution for each state by The Resolution Systems Institute (RSI), a non-profit organization in the United States that has developed a searchable online database called "Court ADR Across the U.S." that proves how New York, California, Texas, and Maryland court systems are recognized leaders in the dispute resolution field. *Court ADR Across the U.S.*, Resol. Systems Inst., https://www.aboutrsi.org/ [https://perma.cc/ H5A8-X3H5] (last visited Oct. 30, 2024).

64. For a review of the Pound Conference, see A. Leo Levin & Russell R. Wheeler, Epilogue, *in* The Pound Conference: Perspective on Justice in the Future: Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice 289, 291 (A. Leo Levin & Russell R. Wheeler Eds., 1979).

65. For the history of the "Modern Mediation Movement" see generally Patrick Fn'Piere & Linda Work, *On the Growth and Development of Dispute Resolution*, 81 Ky. L. J. 959 (1992-1993); Kimberlee K. Kovacii, Mediation: Principles And Practice 30–32 (3d ed. 2004); Linda R. Singer, *The Quiet Revolution in Dispute Settlement*, 7 Mediation Q. 105 (1989); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 Penn St. L. Rev. 165, 171–81 (2003); Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "the Law of ADR,"* 19 Fla. St. U. L. Rev. 1, 6–8 (1991).

66. Frank E. A. Sander, *Varieties of Dispute Processing*, *in* The Pound Conference: Perspectives on Justice In the Future, *supra* note 64, at 65.

truly different from going to court.[67] The value of mediation and other forms of ADR lay in their supposed contrast to the adversarial, win-lose processes of litigation. In particular, ADR was said to offer the possibility for individuals to resolve matters while maintaining relationships; create opportunities for creative and innovative problem solving; focus on party participation and satisfaction;[68] allow for the maintenance of the confidentiality of the procedure;[69] and create opportunities for self-determination.[70]

Over time, however, these visions and objectives were replaced by a different attitude that moved ADR into the courthouse or more directly into the context of litigation, meaning ADR was no longer a true "alternative."[71] A pivotal moment in this shift occurred when courts were given the authority to order cases to mediation.[72] The marriage of ADR, specifically mediation, with the court system has compromised the foundational values upon which ADR was established.[73] Conciliation,

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67. Timothy Hedeen, *The Evolution and Evaluation of Community Mediation: Limited Research Suggests Unlimited Progress*, 22 CONF. RESOL. Q. 101, 103 (2004).

68. Kimberlee K. Kovach, *The Mediation Coma: Purposeful or Problematic,* 16 CARDOZO J. CONFLICT RESOL. 755, 762.

69. *See generally* Ellen E. Deason, *The Quest for Uniformity in Mediation Confidentiality: Foolish Consistency or Crucial Predictability?*, 85 MARQ. L. REV. 79 (2001) (advocating for the adoption of the Uniform Mediation Act (UMA) to increase predictability on the approach to confidentiality in mediation).

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

71. Kovach, *supra* note 68, at 762–63.

72. For instance, statutes were enacted in 1987 in both Florida and Texas authorizing the courts of the states to actually mandate and order pending litigation cases, civil and family, to mediation. TEX. CIV. PRAC. & REM. CODE ANN. §154.001 et. seq. (West 2023); Fla. R. Civ. P. 1.700(a).

73. Several scholars commented that ADR, when combined with courts, lost its potency; *see* Kovach*, supra* note 68, at 764 (noting that mediation had ceased to be "a process that offered such attributes as party empowerment and creative solutions, but rather . . . a process that would settle cases); Bush & Folger, *supra* note 70, at 743 (referring to courts as the "captors" of mediation); Jacqueline M. Nolan-Haley, *Mediation: The New Arbitration*, 17 HARV. NEGOT. L. REV. 61, 61 (2012) (arguing that changes in mediation practice that cause it to increasingly resemble arbitration and judicial settlement undermine individualized justice); *see also* Bobbi McAdoo & Nancy A. Welsh, *Look Before You Leap and Keep on Looking: Lessons from the Institutionalization of Court-Connected Mediation*, 5 NEV. L. J. 399, 400 (2005) (describing the institutionalization of mediation within the court system and prospects for reform);

informality, self-determination, creativity, and confidentiality faded away and vanished as a result. In a system that heavily prioritizes judicial settlements[74] and where coerced settlements by judges are prevalent,[75] the affiliation of ADR procedures (inherently aimed at reaching a settlement) with the U.S. court system (and its issues) has diminished the charm of ADR.[76] Scholars

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Wayne D. Brazil, *Continuing the Conversation About the Current Status and the Future of ADR: A View from the Courts*, 2000 J. DISP. RESOL. 11, 29 (2000) (noting the variety of adversarial activity in mediation); Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58 (2004) (noting concerns about the loss of equity as a core value when mediation is blended with settlement and law); Ellen E. Deason, *Procedural Rules for Complementary Systems of Litigation and Mediation – Worldwide,* 80 NOTRE DAME L. REV. 553, 555 (2005) (highlighting concerns that the core values of mediation are threatened as it becomes an established part of the litigation system).

74. 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,* DIR. OF THE ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2018.pdf (last visited Oct. 30, 2024). 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*, DIR. OF THE ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/sites/default/files/data_tables/jb_c4_0930.2021.pdf (last visited Oct. 30, 2024). In 2020–21 just 0.5% of federal civil filings reached trial.

75. *See, e.g.,* Fiss, *supra* note 52, at 1075 (arguing that "although dockets are trimmed, justice may not be done" in settled cases); Resnik, *Symposium on Litigation Management, supra* note 52, at 496 (exploring the role of the Federal Rules of Civil Procedure in providing judicial guidance on settlement practices); Coleman & Silver, *supra* note 52, at 102 (describing various devices used by judges and lawyers to encourage settlement and their incentives for doing so); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1980–81 (1989) (discussing the danger of compelled settlement negotiations, and efforts in drafting Rule 16 to prevent judicial coercion); James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial,* DISP. RESOL. MAG., Fall 1999, at 12–13 (suggesting that the majority of judges intervene and encourage settlement, but also noting that most judges do not "bully" the party into settlement); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 520 (2004) (discussing the increase in judges promoting settlement due to training programs, an amendment to the Federal Rules of Civil Procedure, and the enactment of the Civil Justice Reform Act).

76. *See* Kovach, *supra* note 68, at 768 (discussing the negative effects of conducting supposed mediations in an adversarial manner contradictory to the intent of mediation) ; *see generally* Frank E. A. Sander, *The Future of ADR*,

now talk about ADR, and especially mediation, as being in a coma.[77]

At a first glance, the use of mediation and negotiation in the United States and Italy share a common evolution. However, a more detailed examination shows that despite some surface-level commonalities, there are key differences in the development of ADR and the contexts in which ADR has developed within the two systems.

Incentives for conciliation in the Italian system have undergone a complex legislative evolution. This is largely a result of the fact that the public's view of the judicial system and the idea of an authoritative judge was established during the period of totalitarian regimes. Consequently, judges adopt a cautious stance towards amicable, private forms of dispute resolution, and often prefer the resolution of cases only in a formal, judicial manner, i.e. with a decision. As a result, ADR processes have faced difficulties in gaining traction against the prevailing belief that only the state judiciary can dispense justice. The dominance of this view underscores the significance of the Reform seeking to integrate ADR (and, especially, compulsory mediation) into the court.

The situation in the United States is quite different. Specifically, ADR and court-led settlement plays a prominent role in the legal system and is strongly connected to the judiciary. Critics of the processes often focus on the drawbacks associated with the judge's wielding of coercive power in the ADR process. Consequently, mediation and negotiation were initially viewed with skepticism since they appeared too restrictive of parties' freedom to determine outcomes, prompting the need for their separation from the court.[78]

2000 J. Disp. Resol. 3 (2000) (discussing ADR's growing affiliation with the U.S. court system); Bush & Folger, *supra* note 70, at 741 (referencing dissatisfaction with the mediation process as encountered through the court system).

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

78. *See* Kovach, *supra* note 68, at 769 ("In either of these examples, the smaller object, mediation, would sustain greater harm"); Fiss, *supra* note 52,

Thus, the U.S. system should strive to establish a multi-door system characterized not only by numerical diversity but also qualitative differentiation, meaning separation from the court. In a system where debates persist on identifying optimal strategies to prevent the excessive reliance on settlement during the course of litigation, mediation and negotiation must emerge as genuine alternatives to courts. They should function as forums where the above concerns do not arise, establishing a clear distinction between private and public realms of justice. This is so that the ADR methods may enforce their foundational values: informality, self-determination, creativity, and confidentiality. These values might not be correctly pursued if ADR are integrated in the public procedure such as a court, which is governed by formality, strict rules and procedure, and publicity.

The aforementioned considerations highlight the crucial importance of engaging in a thoughtful discussion that emphasizes the need for careful implementation of U.S. ADR methods in Italy.[79] In other words, mediation and negotiation in Italy and the U.S. share the same fundamental principles that underpin the effectiveness of the two institutions. They also share same shortcomings, which have somewhat hindered their progress and rendered them dormant. However, the path to resolving these shortcomings differs for each country: in the case of the United States, the prince charming to awake these sleeping

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at 1075 ("the account of adjudication and the case for settlement rest on questionable premises").

79. The legal transplant refers to 'borrowing' law from another legal system. The theoretical debate on the possibility and the benefits of legal transplants has been truly polarized. One extreme argues that legal transplant is logically impossible because any legal transplant is only skin-deep, it is only words, the law on the books. Law mirrors the society where it exists; thus, when it is taken away from its root, it ceases to exist. For this position see generally P. Legrand, *The Impossibility of "Legal Transplants"*, 4 Maastricht J. of Eur. Compar. L. 111 (1997); L. Friedman, A History of American Law 595 (2d ed. 1985). At the other extreme, the great importance of legal borrowing is sustained by reference to the scale of the reception of Roman law and the spread of English common law. Law can be transplanted and has the capacity of a truly long life. In this sense, a borrowed law can also morph the society's needs where it is transplanted because the society adapts itself to law. For this position see Alan Watson, *Comparative Law and Legal Change*, 37 Cambridge L.J. 313 (1978). For more insights on this concept see generally, Alan Watson, Legal Transplants: An Approach to Comparative Law (2d. ed. 1993); Michele Graziadei, "*Comparative Law as the Study of Transplants and Receptions*" *in* M. Reimann and R. Zimmerman, The Oxford Handbook of Comparative Law (2007).

beauties is to move away from state courts, whereas in Italy, it is to align closer with them.

B. *Resembling the U.S. Pretrial Phase*

Even after the Reform, it would not be accurate to describe the U.S. and the Italian civil proceedings as 'spitting images' of each other. However, the Italian legislature has nonetheless significantly narrowed the gap between the two models, even if unintentionally, especially with regards to the pretrial phase.

The traditional dichotomy between the adversarial and the inquisitorial model, one of the main distinctions between common and civil law systems, becomes blurred after the Reform.

That said, the strict view of the U.S. system as purely adversarial and the Italian system as purely inquisitorial before the Reform is a mischaracterization. This mistake is due to erroneous stereotypes referring to certain (artificial) inquisitory characteristic of the Continental European systems, such as the Italian one.[80]

Although we do not want to delve deeply into these stereotypes in this article,[81] an example is instructive. It has been widely claimed that in Continental inquisitorial systems, like the Italian one, the power to identify legal issues and to determine facts subjected to proof belongs to the judge.[82] If the term

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80. *See* Taruffo, *Aspetti Fondamentali*, *supra* note 12, at 32 (which notes that nothing has been weirder to the history of civil law than a truly inquisitorial model of civil process); *see also* Astrid Stadler, *The Multiple Roles of Judges in Modern Civil Litigation*, 27 Hastings Int'l & Comp. L. Rev. 55, 56 (2003) (analyzing the evolving roles of judges and attorneys in European civil litigation, with a focus on balance between judicial initiative and party autonomy).

81. For a deeper discussion on the matter see Cavallini & Cirillo, *Reducing Disparities in Civil Procedure Systems, supra* note 4, at 104 (discussing the convergence of adversarial and inquisitorial features in Italy's 2022 reform).

82. Herbert J. Liebesny, Foreign Legal Systems 128 (4th ed. 1981) (highlighting the increasing involvement of judges in the fact-gathering process in the evolution of judicial activism in Italian civil litigation); John H. Merryman, the Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America 36 (2d ed. 1969) (discussing the distinct roles of judges in civil law systems, focusing on their fact-finding responsibilities); *see also* Benjamin Kaplan, Arthur T. von Mehren, & Rudolf Schaefer, *Phases of German Civil Procedure* (pts. I & II), 71 Harv. L. Rev. 1193, 1443 (1958) (discussing German system as an example of the inquisitorial process).

inquisitorial is used within this meaning, it is wrong to consider the Italian system of civil justice as inquisitorial.

Since the introduction of the 1806 Napoleonic Code, Italian civil procedure has been structured so that providing material facts and allegations have been in the parties' exclusive power from the time of the introductory pleadings.[83] The parties' lawyers shoulder the primary responsibility of identifying the legal issues at stake, sharpening the legal analysis, and introducing the facts to be proved (*i.e.*, the *thema decidendum et probandum*). Moreover, the ability of judges to introduce facts[84] *sua sponte* is strictly prohibited because it is a violation of judicial impartiality, provided for in Section 111, paragraph 2 of the Italian Constitution.[85] Further, Italian judges have very limited powers to introduce evidence through their own initiative.[86] Even these limited powers are subject to stringent limitations, enhancing the control of the parties.[87]

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83. *See* Langbein, *supra* note 12, at 824 (emphasizing judicial control over fact gathering in the European civil procedure system and comparing it to the adversarial nature of American procedures).

84. Facts are the occurrences which gave rise to the controversy. However, courts do not work directly with facts that happened in reality. They, instead, deal with the reconstruction of these facts made by the protagonists of the lawsuit. Facts, therefore, do not enter the trial (unless with some exceptions) in its empirical materiality, for the apparent reason that they occurred before and outside the trial. Instead, they come at the trial in the form of organized enunciations describing occurred facts, i.e., as narrations. The parties prove, therefore, the narratives describing facts using evidence, which includes documents, persons, things, inspections, experts' reports, and any other item that may make the existence of a fact more or less probable.

85. Art. 111, para. 2 COSTITUZIONE (It.).

86. Art. 115.1 of Italian Code of Civil Procedure states that "*save where otherwise provided by the applicable law provisions, the judge shall base his decision on the evidence offered by the parties or by public prosecutor, as well as on the facts which have not been specifically denied by the party who filed his appearance*"; translated and reprinted in GROSSI & PAGNI, *supra* note 28, at 160. Consider that the judge's initiative powers regarding evidence are allowed in certain cases because the evidence is still based on facts that can only be introduced by the parties.

87. The decisionmakers are obliged to submit the evidence they introduce for the parties to debate, in order to allow them to exercise their defenses and submit their counterevidence. Moreover, Judges' evidentiary initiative may not be justified by the deficiencies of the evidence requested by the parties to ascertain the facts. Indeed, the judge's powers to order specific evidence may be exercised only if the evidence is grounded in the facts alleged by the parties.

There are crucial differences between the adversarial and non-adversarial systems with regards to the role played by the judge in the early stages of the lawsuit (for our purposes, the introductory phase in the Italian system and the pretrial phase in the U.S. system) and the managerial power of judges when conducting the lawsuit. However, we will show how the Reform has brought the Italian introductory phase and the American pre-trial phases closer in line with one another, including by changing the scope of the first hearing. We will then show that the U.S. pre-trial phase has evolved in ways that make it misleading to call it purely adversarial, further bridging the divide between the two systems.

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

As discussed, Italian civil proceedings do not distinguish between pre-trial and trial phases. A claim entails only a single event (the trial), structured across several hearings.[88] Moreover, the decision maker is always a judge; there is no provision for a trial by jury or for a jury as a finder of fact.[89]

Even with the Reform, litigation is still not formally divided between pretrial and trial phases. Despite this persistent difference between the Italian and the American systems, the systems have converged in important ways.

The peculiarity of the new Italian civil proceeding structure, specifically the new scope of the first hearing, is that it turns on the judge's particular and novel role in determining the form of resolution at the first hearing. This occurs when the judge is presented with the facts, documents, and matters on which witnesses intend to testify *after* the first hearing.[90] In other words, the judge in an Italian civil proceeding is now allowed to address the resolution of the dispute at the first hearing, which is before the completion of the evidence collection phase but after having acknowledged the relevant facts and evidence requests.

There is a wide range of possible measures at the judge's disposal at the first hearing that includes scheduling an additional

88. CHASE ET AL., *supra* note 12, at 341–42.
89. *Id.* at 341.
90. *See* Section II.B. of this Article.

hearing to question witnesses and the parties, promoting a judicially-led settlement, and issuing a summary adjudication.[91] These outcomes require the judge to have a complete knowledge of the facts and evidentiary requests before the first hearing.

There is no doubt that the new Italian civil proceeding model still precludes a complete discovery process outside the supervision of a judge, as in the idealized American model.[92] However, the revamped structure raises the question of whether and how the new Italian civil proceeding structure now resembles more closely the American one.

The new structure of Italian civil procedure demonstrates that a comprehensive preliminary phase, where facts and evidentiary material are collected and there is a duty of complete disclosure, can be organized as a continuous process, rather than being formally divided into distinct stages. As a result, there is no need for a strict division between pretrial and trial stages as in the traditional American model. The traditional distinction between the discovery phase and the trial, present in an adversarial model,[93] can be collapsed into a singular proceeding with different installments,[94] as in the new Italian system (which remains non-adversarial). Post-Reform, the judge

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91. *Id.*

92. *See* Section III.B2 of this Article. Consider that the traditional adversary system, as designed by the 1938 U.S. Federal Rules, provided that following the filing of the claim by parties, the judge did not intervene during the pre-trial stage. The judge's involvement occurred only if requested by parties (e.g., for granting a motion for summary judgment, a date for trial, a pretrial conference). Nonetheless, the 1938 Federal Rules allowed litigants to ask for court's help. Over the years, judges' role in ruling on discovery issues became qualitatively different from their role in the traditional model. Amendments to the Federal Rules provide rules for pretrial management in all cases, expanding the federal judge's pretrial powers noticeably. For an eloquent discussion on the role of the parties in preparation for trial, along with a description of the growth of judicial case management over time, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 384 (1982). The Author explains how the role of the parties in preparation for trial was even more autonomous before the 1938 Federal Rules of Civil Procedure, *id.* at 392 n.64, quoting Robert W. Millar, *The Mechanism of Fact-Discovery*, 32 ILL. L. REV. 424, 449 (1937) and Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 869–77 (1933) for a discussion concerning state court innovations with respect to common law discovery.

93. CHASE ET AL., *supra* note 12, at 251, 281.

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

continues to have a relevant managerial role, especially during the taking of evidence phase.

Thus, one possible meaning of the "Americanization" of the Italian civil justice system (post-Reform) is that both legal families share a common framework, despite some differences. This common framework is a function of the close relationship between the declaring of the so-called *thema decidendum atque probandum* (alleged facts, documents, and presentation of oral proofs) by the parties *before* the first hearing and the function of the hearing itself.

In our view, the Reform reflects the "Americanization" of Italian civil proceedings because it confers a new role on the first hearing and creates a new, comprehensive preliminary phase. As mentioned above, before the Reform, the first hearing was devoted to a mere meeting between the parties' lawyers before the court and was more of a formality in the civil proceeding.[95] The parties' lawyers went to the first hearing to merely request to be allowed to file the three pleadings for specifying/modifying their facts and their evidence requests, without any further discussion.[96]

The post-Reform structure has several benefits. It can expedite the final decision-making process and reduce the need for a lengthy and costly trial.[97] Further, if the subject of the dispute, the documentary evidence, and the non-documentary requests for evidence are all straightforward and specified at the first hearing, the hearing assumes a number of essential functions (rather than just the throat-clearing exercise that it served as before the Reform).

First, the parties assume a more autonomous role before the hearing, where the process is now more adversarial as it leads parties to more aggressively discover and gather more

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95. *See* Section II.B. of this Article.

96. Cavallini, *supra* note 29, at 161.

97. Many authors highlighted the efficient results brought by a complete preliminary conference and the relevant role of discovery. *See* John P. Frank, *Pretrial Conferences and Discovery - Disclosure or Surprise*, 1965 INS. L.J. 662 (noting that eliminating surprise at trial serves two primary purposes: ensuring fair and just outcomes, and expediting trial proceedings to save time for counsel, parties, and the courts); *see also* STEPHAN LANDSMAN, READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 1–5 (1988) (observing that judges' neutrality can be strained during their active management of pretrial proceedings, suggesting that a structured preliminary conference and discovery process may better balance their role and improve efficiency).

information.[98] Second, it leads to introductory pleadings that more comprehensively allege relevant facts. Complete introductory pleadings, paired with comprehensive discovery, lead to a more precise circumscription of the subject matter of the dispute earlier-on in the process. This reduces the opportunities for abuse of judicial discretion and encourages focusing on the important issues at hand.[99] Finally, since the judge conducts the first hearing already knowing the boundaries of the dispute, to the extent of being able to provide for the decision, the principle of concentration, along with the principles of immediacy and orality, representing cornerstone of the Italian civil procedure and also the values behind the U.S. "day-in-court",[100] becomes more effective.[101] Ultimately, by allowing for a continuous process that combines elements of an adversary

98. Richard A. Posner, Economic Analysis of Law, 422–27 (2d 1977).

99. In this respect, the factual sufficiency standard is a good proxy for meritlessness and, thus, it enhances the fairness of the procedure. *See* Adam N. Steinman, *The Pleading Problem*, 62 Stan. L. Rev., 1293, 1347–50 (2010) (discussing the role pleadings play in merit screening; *see also* Edson R. Sunderland, *Growth of Pre-Trial Procedure*, 44 Com. L. J. 406, 407 (1939) (describing how pre-trial discovery and proceedings can help diminish the risk of error by simplifying proceedings and weeding out insubstantial claims); Clarence L. Kincaid, *A Judge's Handbook of Pre-trial Procedure,* 17 F.R.D. 437 (1955) reported in Shelden D. Elliot & Delmar Karlen, Cases and Materials on Pleading and Procedure before Trial 342 (1961) (describing the aims of pre-trial proceedings); Hans Zeisel, Harry Kalven, Bernard Buchholz, Delay in the Court, 141–54 (1959) (discussing the positive effects of pre-trial proceedings on the litigation process).

100. Damaška, The Faces of Justice, *supra* note 12, at 51 (using this expression to indicate the trial model where all material bearing on the case is preferably considered in a single block of time. While, the opposite variant, commonly ascribed to Continental systems, provides for proceedings developing through separate sessions at which material is gradually assembled in a piecemeal, or in installment style).

101. The principle of concentration has been considered as a prerogative of the adversary model of civil justice. *See, e.g.*, John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 Yale L. J. 522, 529–30 (2012) (discussing the Anglo-American trial as concentrated and the jury-free Continental legal systems as civil proceedings which are discontinuous); Benjamin Kaplan, *Civil Procedure-Reflections on the Comparison of Systems*, 9 Buff. L. Rev. 409, 419 (1960) (discussing how concentrated trials tend to occur in a single continuous manner which has affected the role of the American lawyer and judge). However, it is important to note that this principle also exists in Continental legal systems and holds significance as an ancient cornerstone for interpretation, study, and reforms in countries such as Germany or Italy.

system with aspects of non-adversarial procedure, the reformed Italian system strikes a balance between efficiency and fairness.

This new structure parallels the classic U.S. pretrial phase, related to Federal Rule of Civil Procedure 16 and its authorization for a preliminary conference, but represents something new from an Italian judge's point of view. Undoubtedly, and as already discussed, the most important tool has been the revised scope of the first hearing and the related judge's role and powers during and afterward this hearing.

The Reform, however, still maintains the judge's role in conducting the dispute and the collection of oral evidence following the first hearing. This is another area in which Continental systems present a stark contrast to Common law systems. Evidence-taking in the Anglo-American system is characterized by the strict association of all evidence with a specific party. One way this manifest is in counsels' power to directly examine and cross-examine witnesses.[102]

Under the Continental system, the judge takes testimonial evidence, and lawyers are not encouraged to prepare their witnesses. As a result, when a court admits counsel's proffered testimonies, the tie between witnesses and counsel weakens.[103]

The Reform does not aim to fundamentally change the judge's essential role in the taking of evidence. It does not confer the power to question a witnesses to a counsel instead of the judge, as in the U.S. system. In that respect, the Reform has made no change to how proceedings are ordinarily governed.

However, the Reform does bring the Italian system substantially closer to the American one with regards to the rules governing negotiation at the preliminary phase.[104] The new out-of-court discovery process during negotiations allows

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102. *See* DAMAŠKA, EVIDENCE LAW ADRIFT, *supra* note 12, at 76 (discussing about the "*polarization of means of proof*").

103. Under the Italian Code of Civil Procedure, the judge or other officials are assigned the task of collecting oral evidence, while the involvement of counsel in preparing witnesses is strongly discouraged. The judge assumes responsibility for questioning parties and witnesses, selecting expert witnesses, and recording the gathered evidence. *See* CAVALLINI, *supra* note 43, at 150, 156; *see also* CHASE, ET AL., *supra* note 12, at 350 (discussing the role of the judge as more passive in American litigation as compared to civil law countries and the role of the attorney in reviewing evidence in American litigation); Strier, *supra* note 4, at 111 (discussing the increased responsibility of judges for evidence taking within an inquisitorial system).

104. *See* Section II.A of this Article.

lawyers to directly question the witnesses and the parties. If the negotiation fails, the statements gathered by the lawyers may be used in the subsequent trial. This is particularly important because negotiation is compulsory for certain types of disputes.

Here, too, we can see a narrowing of the divergence between the two systems in respect of the methods for the taking of evidence before trial.[105]

2. *The U.S. System's Continuing Path towards a Semi-Adversarial Model*

To gain further insight into the Americanization of the new Italian model of civil procedure, we will now undertake an analysis of the U.S. system, exploring whether the convergence of the two systems can be explained not only by the Reform but also by an organic departure from the adversarial system in American civil procedure. In particular, we will argue that the key factor contributing to the convergence of the two systems, prior to the Reform, was the departure from a purely adversarial system due to the increasingly redundant functions of the pretrial and trial by jury phases.[106]

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105. For the benefits of a competitive procedure for taking the evidence, where a crucial role is played by lawyers instead of the judge see 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE SPECIALLY APPLIED TO ENGLISH PRACTICE 212 (London, Hunt & Clarke 1827) (discussing how witness questioning must be carefully crafted to illustrate the truth in court). *See generally* WILLIAM TWINING, RETHINKING EVIDENCE (2d ed. 2006) (emphasizing the significant role of evidentiary rules in the litigation process); JOHN H. WIGMORE, 5 EVIDENCE IN TRIALS AT COMMON LAW (Chadbourn rev. 1974) (tracing the history and importance of the evidence doctrine). Other scholars believe that mitigation of parties' powers for fact-finding may overcome adversarial distortion or manipulation of the evidence. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1037 (1975) (highlighting the usefulness of the adversary technique while noting that other disciplines do not "emulate our adversary system"); Jules Epstein, *The Great Engine that Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 782–83 (2007) (suggesting the judiciary can reduce the risk of mistaken identifications in criminal cases by increasing the use of expert testimony and detailed jury instructions); Susan Haack, *Truth and Justice, Inquiry and Advocacy, Science and Law*, 17 RATIO JURIS 15, 24–25 (2004).

106. *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE 447–48 (6th ed. 2021) (describing broad and expanding judicial discretion on range of possibly controlling pretrial matters).

This phenomenon has occurred along two lines, ultimately affecting the pretrial phase. First, judicial activism in the management of discovery—like in the Italian system—has been progressively increasing.[107] Additionally, American judges are now increasingly active in promoting settlement, to the point where many scholars are now reacting to what they perceive as a culture of "coerced settlements."[108]

Thus, the U.S. system is no longer purely adversarial, but rather echoes the Continental model of civil law, given that it involves the judge in the management of the discovery phase. This contemporary system has been criticized as ripe for "abuse" by lawyers,[109] for promoting fishing expeditions for favorable judges and becoming excessively expensive.[110] Notably, U.S.

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107. *See, e.g.,* Resnik, *Managerial Judges*, *supra* note 92, at 374 (connecting growth of judicial managerial role with creation of pretrial discovery rights); Stephen A. Saltsburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 7–9 (1978) (noting greater judicial assumption of active role in clarifying evidence and assisting the jury); Stephen Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts,* 29 BUFF. L. REV. 487, 507–08 (1980) (describing "marked expansion of managerial powers" of trial judge, particularly at pretrial); Mark Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257, 258–59 (1986) (discussing emergence of pretrial conferences and increased settlements as a result of increased judicial participation); Galanter, *supra* note 75, at 519 (demonstrating how the expansion of managerial judicial activity has increased pretrial discovery); 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, 1817 (2014); Robin J. Effron, *Ousted: The New Dynamics of Privatized Procedure and Judicial Discretion*, 98 B.U. L. REV. 125, 168 (2018).

108. See for example Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L. J. 1199, 1200 (2000); Laura M. Warsarwsky, *Comment, Objectivity and Accountability: Limits on Judicial Involvement in Settlement*, 1987 U. CHI. LEGAL F. 369, 371–74.; Judith Resnik, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 73. See also in a broader comparative view, Cavallini & Cirillo, *In Praise of Reconciliation, supra* note 38, at 64 (explaining how judges may misuse their authority to force parties to settle).

109. Frank H. Easterbrook, *Discovery as Abuse,* 69 B.U. L. REV. 635, 636 (1989). It is worth noting also that the so-called "abuse of discovery" has been one of the crucial points raised by the U.S. Supreme Court in modifying the pleading standards: see, recently, from a civil law lecture, Cesare Cavallini, *The Determination of the U.S Pleading from a Civil Law Perspective,* 21 WASH. U. GLOB. STUD. L. REV., 155, 166 (2022) (discussing changes to pleading standards following *Twombly* and *Iqbal*).

110. *See, e.g.,* Easterbrook, *supra* note 109.

judicial activism has not embraced a sanctioning approach to discovery excess, but such activism has influenced pleadings. In this way, the identification of claims, typical of Continental judicial practice, has reshaped the content of U.S. pleading and limits discovery to only facts relevant to those stated claims.[111]

From a broader perspective, it is worth noting that concerns with the purely adversarial model are even more evident in the current UK legal system, with significant changes to address starting with Lord Wolff's reforms in 1999.[112] The overcoming of the pre-existing model took place, first, through a new active role played by the judge who deals with the dispute according to different procedural paths, depending on the dispute's complexity. While retaining the judge's discretionary power, assigning the dispute to one of these paths is based on judicial evaluation of the introductory pleadings and the sketch of the dispute carved in the discovery disclosure, which is strictly centered on the claims.

The relevance of managing judging in the renewed English system, especially in cases of first-rate value and complexity,[113]

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111. *See* Cavallini, *Determination of the U.S Pleading*, *supra* note 109, at 155 (discussing the role of judicial activism and discovery-related concerns in altering pleading requirements); FRIEDENTHAL ET AL., *supra* note 106, at 426. For instance, the Amendments in 2006 and 2015 regarding aspects of the discovery process and generally Rule 26 (f) emphasizing plans for pretrial discovery, work all together with Rule 16 as managing tools "facilitating the decision of the case on its merits." *See also* Steven S. Gensler, *Judicial Case Management: Caught in the Crossfire*, 60 DUKE L. J. 669, 669 (2010) (discussing the role of active judicial case management in reducing costs and delays).

112. *See* John A. Jolowicz, *The Woolf Report and the Adversary System*, 15 C.J.Q. 198 (1996) (describing the increased role of the judge in pretrial management as a result of the Woolf Report in England); *more recently, see* John Sorabji, *Woolf's New Theory: a Traditionalist View, in* ENGLISH CIVIL JUSTICE AFTER THE WOOLF AND JACKSON REFORMS 107–34 (2014) (describing the Woolf Reforms' aim to make civil litigation more efficient within the traditional objective of achieving substantive justice in England).

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

refers to the centrality of the process' direction by the judge from the beginning. In this way, the English process has come to resemble, at a general level, the early crucial role assigned to the judge in most of the Continental systems. As in the United States, the downsizing of the Anglo-Saxon system, traditionally based on the pure adversary system model, undoubtedly reveals a progressive alignment with those of the Continental tradition.

The new managerial approach of the judge is relevant to another aspect of the authorized but not required pretrial conference. By having an active role, judges can now seek complete knowledge of the facts and the related claims before the pretrial conference and determine the content of the conference *according to* Rule 16 of the Federal Rules of Civil Procedure.

What this means is that the pretrial conference, which was created to prepare the dispute for trial, has progressively changed in scope, looking to end the conflict with various procedural devices and avoid trial.[114] Indeed, the growing importance of the pretrial conference is viewed as centering "nontrial procedure,"[115] which generates conditions that lead parties to avoid trial and are subject to dispositive motions for summary judgment on documentary evidence or settlement of the case.

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114. The transformation of the scope of the pretrial conference regulated by Rule 16 of the Federal Rules has been the subject of a wide debate among the U.S scholars. *See, e.g.,* Shapiro, *supra* note 75, at 1973–74 (describing how the Federal Rules were introduced during the rise of the realist movement, which questioned the actual impact of such rules; *see also,* Thomas D. Rowe, *Authorized Managerialism Under Federal Rules- And the Extent of Convergence with Civil – Law Judging*, 36 Sw. U. L. Rev. 191 (2007) (describing the increase in pretrial managerial judging in American federal courts in response to its authorization in the Federal Rules, while maintaining that the American system has not converged entirely with the civil-law system); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 938–40 (2000) (describing Rule 16 as a response to congressionally-enacted regulatory regimes and the judiciary's new legal doctrines which created the "protracted case"); Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 Brook. L. Rev. 761, 790–91 (1993) (describing the rise of managerial judging largely as a response to the adoption of the single assignment system, rather than the "protracted" case). E. Donald Elliott, *Managerial Judging, and the Evolution of Procedure*, 53 U. Chi. L. Rev. 306, 308–09 (1986) (describing the rise of managerial judging as a sign that the federal civil litigation system does not work, leaving judicial intervention as the only solution).

115. *See* Langbein, *supra* note 101, at 542 (discussing how, in a system where only 1 to 2% of cases reach trial, "nontrial procedure" is a more descriptive term than pretrial procedure).

As a result, the typical common law process is now basically reduced to a single phase, the pre-trial.

In the pre-trial phase, the parties, under the direction of the judge, clarify the boundaries of the dispute, acquire information about their respective defenses and the evidence that might be used in the possible trial stage, and consider the possibility of a settlement or other ways to more promptly resolve the dispute. Therefore, since almost 99% of all civil cases are resolved without a trial,[116] the pre-trial conference serves its original purpose (preparing for trial) only when it "fails," that is, in the rare cases in which the pre-trial mechanisms that serve to ensure an early resolution of the case do not work.

This evolution of the purpose of the American pre-trial phase, from clarifying the dispute and preparing parties for trial to actually diverting cases from going to trial, underscores parallels to Italian procedure after the Reform and highlights how the U.S. system is increasingly only semi-adversarial. To reiterate, first, pretrial discovery is often used to define the issues and facts that arise from the introductory pleadings.[117] Second, the judge's unceasing supervision, directing discovery with case-specific "orders," governs the pretrial conference and influences the form of resolution of the dispute. Pretrial phase now involves a judge dealing with jurisdiction issues, stay issues, ordering admissions or stipulations of the parties, list of witnesses, and generally of the evidence to be discussed between lawyers at the final pretrial conference. This kind of broad and discretionary power of the pretrial judge does not necessarily move towards the trial, but rather toward different modes of termination (above all, the motion to dismiss and the summary judgment)[118] or settlement proposals. Thus, the

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116. *See supra* note 75.

117. *See* FRIEDENTHAL ET AL., *supra* note 106, at 447 and related footnotes (explaining how he processes in pretrial discovery facilitate presenting evidence during trial). This usual judicial managing behavior is exemplified in Rule 16(c)(2)(M), which expressly provides for a pretrial conference to set a *separate* hearing regarding specific issues of facts related to a claim, counterclaim, or crossclaim.

118. The increased use of the motion to dismiss and the summary judgment is the result of the changed pleading's determination, following the well-known *Twombly* and *Iqbal*, which have definitively abandoned the original path of the notice pleading to reach the formulation of a judicial request that immediately identifies the relevant facts suitable to support the claims to obtain the relief. *See e.g.,* Stephen B. Burbank, *Pleading and the Dilemmas of*

pretrial conference now plays the role of assessing whether there are ways to "prevent" the trial. Understood this way, the gap between the American and Italian systems is narrower than it might initially appear. While the U.S. system has progressively moved toward affording the judge a more managerial role during the pre-trial phase, the Italian system since the Reform has assigned the first hearing the exact scope of the U.S. pretrial conference. The crucial commonality is the judge's role and approach to the case. In both systems, the pretrial conference or first hearing respectively are the stages from which the lawsuit moves to the trial and adjudicatory phase and where the parties must definitively set forth all the issues of facts and the evidence before moving on. The judge's approach to the lawsuit is not only to prepare for trial, but also to select from different devices for ending the case without a trial or formal adjudication. As a result, the Italian system, as well as the American one, can both be understood as semi-adversarial.[119]

C. *The Judicially-Led Settlement as a Common Form of 'Adequate' Dispute Resolution*

The Reform's changes to judicially-led settlements offer another interesting convergence point between the Italian and American systems. However, unlike the pre-trial/first hearing phase, only the Italian system has undergone a significant evolution in this regard.[120] Much like in the U.S., the post-Reform Italian system allows for judges to promote settlement after the boundaries of the dispute have been delineated.[121] However, it is instructive to consider whether the American system could benefit from the implementation of principles that govern judicially-led settlement within the Italian system.

Modern American Procedure, 93 JUDICATURE 109, 110 (2009); Robert. G. Bone, *Twombly Pleading Rules, and the Regulation of Court Access,* 94 IOWA L. REV. 873, 882–90 (2009); Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 466–471, 482 (1986).

119. *See* Cavallini & Cirillo, *Reducing Disparities in Civil Procedure Systems, supra* note 4 (concluding that the U.S. follows a semi-adversarial system of law, and that the Italian Reform of Civil Procedure led Italy to a semi-adversarial judicial model).

120. *See* Section III.B of this Article.

121. *See* Section II.C of this Article.

The American system has experienced such a large increase in the number of cases resolved through settlement promoted or facilitated by the judge during the pre-trial stage that scholars now write about the "vanishing trial" phenomenon.[122] This shift has impacted the judicial role; judges often now personally engage in settling and resolving disputes using facilitative rather than adjudicative skills.[123]

The peculiarity of in-court settlements, like other mechanisms that promote agreement instead of adjudication, such as mediation, is that it places the judge in the position of both a settler and decider. This is a primary reason for concerns about its widespread adoption.

In the United States, massive literature has emerged criticizing the promotion of in-court settlement because of the dangers and drawbacks inherent in an uncontrolled managerial role for judges. The main concern of the "anti-settlement" approach lies in the potential for parties and attorneys to be coerced into a settlement.[124] Critics fear that the directive powers of the judge facilitating settlement might have an influence on the parties' free choice to settle since they might believe that a refusal to settle could have a negative impact on them.[125]

Another criticism is related to the inequality of the resources between the parties. From this perspective, since parties usually

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122. See the following for information on the development of the Vanishing Trial phenomenon in the context of American Civil Procedure. Galanter, *supra* note 75, at 459; Resnik, *Symposium on Litigation Management, supra* note 52, at 783; 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 LEGAL STUD. 943 (2004); ROBERT P. BURNS, THE DEATH OF THE AMERICAN TRIAL (2009); Langbein, *supra* note 101, at 559 (generally discussing the ideal of the vanishing trial); John H. Langbein, *The Demise of Trial in American Civil Procedure: How it Happened, is it Convergence with European Civil Procedure*, *in* TRUTH AND EFFICIENCY IN CIVIL LITIGATION 119, 119–22 (Cornelis H. Van Rhee & Alan Uzelac eds., 2012); NEIL ANDREWS, THE THREE PATHS OF JUSTICE COURT PROCEEDINGS, ARBITRATION, AND MEDIATION IN ENGLAND 13 (2d ed. 2018) (stating that civil trial has become "a rare event"); Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

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

124. *See supra* note 75 for reference to literature discussing the risk of a coerced settlement.

125. MANUAL FOR COMPLEX LITIGATION § 23.11 (3d ed. 1995); *see* D. MARIE PROVINE, SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES 25–34 (1986); Resnik, *Failing Faith*, *supra* note 52, at 552; Alfini, *supra* note 75, at 13.

have unequal bargaining power, encouraging settlement may coerce the weaker party to accept an unfair deal.[126] Moreover, another danger lies in the influence that the settlement activities might have on a judge's independence. The argument is that the judge's involvement in settlement makes it difficult for them to maintain their neutrality in the case.[127]

As previously mentioned, the Reform has created incentives for judicially-led settlement. The relevance of the new approach does not rest in the compulsory nature of the settlement efforts or in the judge's power to make their own proposal for settlement in the final phase of the litigation.[128] Rather, the relevance predominantly rests in the fact that judicially-led settlement, which is now compulsory, is promoted by the judge in a stage of the litigation where the boundaries of the controversy are set.[129] In this stage, the parties have a clear picture of the claims and evidence presented and requested by the other party, given the role of the new first hearing. The possibility of adding new evidence, requesting new non-documentary evidence, or defining their claims is gone. Having a complete picture of the dispute may affect the parties' incentives to settle the dispute.[130]

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126. *See, e.g.*, Fiss, *supra* note 52, at 1076–78 (encouraging settlement may coerce weaker parties into accepting unfair deals). *See also* Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, *in* Reforming the Civil Justice System 13, 16–18 (Larry Kramer ed., 1996) (discussing information asymmetries as one example of unequal resources between the parties to litigation); Coleman & Silver, *supra* note 52, at 110 (nothing that unequal bargaining power between the parties calls into question the moral acceptability of a settlement).

127. Resnik, *Managerial Judges*, *supra* note 92, at 426–31.

128. *See* Section II.C and accompanying notes.

129. Please note that the compulsory conciliation attempt had a troubled path, see Cavallini, *supra* note 43, at 503. In particular, Law number 353 of November 26, 1990, made a conciliation attempt by the judge compulsory and, to this purpose, imposed the personal appearance of the parties at the first hearing. With Law no. 80 of May 14, 2005, the compulsory conciliation attempt at the first hearing was repealed because it was considered unsuccessful. The reason for this failure is that the repealed compulsory conciliation attempt occurred at the first hearing stage, when the parties had not yet revealed their cards fully. In order to enhance the ADR mechanism, the Reform reintroduced it.

130. There is a massive literature on the incentives that bring parties to litigate before the court rather than settle and on the positive impact that knowing the clear defenses that the opposing party might have on the probability of settlement. *See generally*, Gary M. Fournier et al., *Litigation and Settlement, an Empirical Approach,* 71 Rev. of Econ. & Stat. 189 (1989) (providing

Nevertheless, it is crucial to consider the criticisms of settlement in the United States when assessing the Reform. A comparison between the two systems should serve as a cautionary sign highlighting the potential pitfalls associated with these methods of encouraging settlement.

An examination of the Italian rules regarding in-court settlements shows that the Italian procedural framework is well-equipped to mitigate the drawbacks associated with the U.S. system. Specifically, in the United States, any judicially-led settlement activity comes in a stage of the proceeding that is not devoted to the adjudication, the pre-trial phase. Conversely, Italian proceedings provide a specific and mandatory hearing for settlement that takes place in the presence of the parties and occurs in the context of the trial, which is, by definition, devoted to the adjudication.[131]

This contrast in the structure of the proceedings is important for several reasons. As mentioned above, in Italy, settlement is included in the phase of the proceeding aimed towards adjudication. This is significant because it places the judicial conciliation and adjudication functions on the same level within the same proceedings.[132] The system thus applies the same procedural safeguards to both form of resolution. Second, civil law systems, such as the Italian system, provide a specific mandatory hearing during the trial, dedicated to settlement.[133]

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empirical data related to the incentives that bring parties to choose to litigate rather than settle); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (an empirical study based on a model of the economic determinants of settlement and litigation); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55 (1982) (discussing how different models of legal cost allocation impact settlement). Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973) (developing an economic theory of legal administration and procedure).

131. *See* Paolo Biavati, *Conciliazione strutturata e politiche della giustizia*, 59 RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 785, 787 (2005) (discussing how emergence of a "structured" in-court conciliation means 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).

132. *See generally* Michele Taruffo, *I modi alternativi di risoluzione delle controversie*, *in* LEZIONI SUL PROCESSO CIVILE 152 (Luigi P. Comoglio et al., 1998) (discussing the dialectical and competitive relationship between adjudication and in-court settlement).

133. *See* Section II.C and accompanying notes.

This means that the judge does not have a mere discretion to facilitate settlement, but a duty to do so. This creates mitigates procedural differences or inequalities amongst different type of claims. Third, the Italian rules regulating the mandatory hearing for settlement provide that the parties must appear in person for the discussion before the judge to be heard on the settlement proposal.[134] The judge is allowed to ask questions on the claim while discussing the terms of a possible settlement, thus enforcing equal treatment for the parties.[135] In this sense, the judge has no option for *ex parte* communication (*i.e.*, the discussion judge may have with only one party), allowing for all parties to be involved in the discussion of the terms of the conciliation. The discussion between the parties and the judge on the terms of a possible settlement in a public hearing implies public scrutiny on the judge's performance, which ensures the judge's impartiality—the same effect that adjudication is intended to achieve.

In contrast, Federal Rule of Civil Procedure 16 includes the judge's settlement-facilitating authority within the general context of other duties, all pointing towards the general goal of judicial efficiency, imposing a de facto duty to dispose of the case quickly[136] and confers on the judge a large measure of discretion,[137] even for *ex parte* discussions, to achieve that goal.[138] In Italy, specific rules regulate in-court settlement,[139] and they do not afford different regulations regarding managerial, as opposed to adjudicative, powers, as Rule 16 of the U.S. FRCP does. The Italian system thus confers procedural safeguards for conciliation procedure that is absent from the U.S. system. The structure of the Italian framework for in-court settlement is that it promotes the parties' procedural justice goals[140] because

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134. *See* Section II.C and accompanying notes.

135. Rolf Stürner, *Mediation in Germany and the European Directive 2008/52/EC*, *in* La Mediazione civile alla Luce Della Drettiva 2008/52/CE 45, 47–48 (Nicolo Trocker & Alessandra de Luca eds., 2011).

136. Fed. R. Civ. P. 16(a).

137. Ellen E. Deason, *Beyond "Managerial" Judges: Appropriate Roles in Settlement*, 78 Ohio St. L.J. 74, 78 (2017).

138. *See* Jona Goldschmidt & Lisa L. Milord, Judicial Settlement ethics: Judge's Guide 37–40 (Am. Judicature Soc. 1996).

139. *See* Section II.C and accompanying notes.

140. Procedural justice and its relevant rules mainly concern the prevention of typical flaws of legal proceedings, such as the risk of judge's bias. *See* Tom R. Tyler, Why People Obey the Law, 94–108 (1990) (if people perceive

the Italian framework enhances the litigants' perception of elements typically related to procedural fairness. This is because litigants are encouraged to perceive (i) that they have a "voice," *i.e.*, the opportunity to express themselves; (ii) respectful treatment from the decision-maker; (iii) a neutral forum; and (iv) trustworthy consideration from the decision-maker.[141]

The U.S. system would benefit from adopting elements of the civil law system's structure, such as specific hearings for in-court settlement, public forums to discuss the terms of settlement, prohibitions on *ex parte* communications, more impartial decision-makers whose activities are subject to public scrutiny, autonomous rules that specify procedural safeguards in the conciliation process. This would ameliorate concerns over coerced settlements and other pitfalls previously discussed. Insofar as the civil system's approach comports with the ideals of procedural justice, the framework also has the virtue of reinforcing the parties' trust in the judge's work.[142]

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

One of the Reforms' most efficiency enhancing changes is its introduction of new methods for prompt adjudication of the case on the merits. As discussed,[143] at first glance these methods resemble two of the most controversial devices of the American system, the motion for summary judgment authorized by Federal Rule of Civil Procedure 56 and the motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

There are parallel motivations for the introduction and use of these devices, one need to compare the notorious "litigation

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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* Everyday Practices and Trouble Cases 177, 188 (Austin Sarat et al., 1998); Tom R. Tyler, *Citizens Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 Am. J. Comp. L. 871, 885–86 (1997).

141. *See* Zariski & Sourdin, *supra* note 123, at 57–85.

142. For a deeper discussion on the tools that the U.S. system may borrow from Continental in-court settlement framework see Cavallini & Cirillo, *In Praise of Reconciliation, supra* note 38.

143. *See* Section II.D and accompanying notes.

explosion" during the 1980s in the United States[144] and the same occurrence in Italy during the same years.[145] Although the approaches to the increasing demands on the civil justice systems have been different, both systems have opted to use procedural devices to ensure the quick resolution of a case before the final adjudication as one way of addressing increased demands.

In the American system, this has meant "transforming the procedural device into a method frequently used to dispose litigation before trial."[146] Within the Italian legal system, this has led to multiple attempts during the last three decades to enhance new procedural devices for the same purpose, although facing a different structure of civil procedure.[147]

These debates in Italy culminated in the Reform and its introduction of a two forms of summary adjudication, as discussed in Part I-D, that bears a resemblance to the American motion for summary judgment.[148] In both cases, the scope of the procedural devices is to reduce the length of the civil

144. *See* Arthur R. Miller, *The Pretrial Rush to Judgment: Are The "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?* 78 N.Y.U. L. Rev. 982, 984 (2003). As Professor Miller wrote, "In 1986, the now-famous Supreme Court "trilogy"-Matsushita Electric Industrial Co. v. Zenith Radio Corp.,1 Anderson v. Liberty Lobby, Inc., 2 and Celotex Corp. v. Catrett - transformed summary judgment from an infrequently granted procedural device to a powerful tool for the early resolution of litigation. Since then, federal courts have employed summary judgment, and more recently the motion to dismiss for failure to state a claim, in cases that before the trilogy would have proceeded to trial, or at least through discovery". *See generally* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 (1986) (holding that courts should grant summary judgments if the plaintiff's evidence is mere allegations or inferences); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (reinforcing the standard for granting summary judgment); Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (lowering the standard for defendants to obtain summary judgment, allowing cases with insufficient evidence to be dismissed before trial); *See also* Patricia M. Wald, *Summary Judgment at Sixty,* 76 Tex. L. Rev. 1897, 1897 (1998), who underlines the original use by courts of Rule 56 "to weed out frivolous and sham cases, and cases for which the law had a quick and definitive answer"; Diane P. Wood, *Summary Judgment, and the Law of Unintended Consequences,* 36 Okla. City U. L. Rev. 231, 231 (2011) ("[T]the rule opens the door to prompt adjudication; it allows a party to defeat unfounded claims or defenses with little expense . . .").

145. Andrea Proto Pisani, *I processi a cognizione piena in Italia dal 1940 al 2012*, 135 Il Foro Italiano 321, 330 (2012).

146. Miller, *supra* note 144, at 982.

147. *See* Proto Pisani, *supra* note 145, at 329–334.

148. *See* Section II.D and accompanying notes.

proceeding when the facts are not disputed.[149] The comparison opens up interesting insights and sheds light on Arthur R. Miller's criticism of the American practice.[150]

More specifically, in post-reform Italy, summary adjudication consists of a judge's decision, issued after the first hearing, and following a summary sub-proceeding devoted to ensuring both parties the right to be finally heard on the merits.[151] The equivalent tool in the U.S. is commenced under certain conditions, including disregarding the need for additional discovery to issue a decision.[152] The Italian and American approach are now both grounded in a judicial determination on an unquestioned set of facts that emerge from the pleadings stage (including amendments), that allows for a judgment on the law. Issues of law are the prerogative of the judge within the American system. In the Italian system (and for the whole civil law legal family), the issue of law is also the prerogative of the judge, based on the universally recognized principle of *iura novit curia.*[153] Therefore, both systems are grounded on similar requirements, irrespective of the structural differences of the civil proceeding.

The qualms raised by the U.S. literature surrounding these mechanisms stimulate certain considerations related to the Americanization brought by the Reform. Wondering about Americanization also means that the Reform should refrain

149. For the Italian system see Reform Report, *supra* note 49, at 27.

150. *See* Miller, *supra* note 144, at 1074–75. In particular, Professor Miller expresses concern that courts too often appear to be placing their interests in the efficient resolution of disputes, concerns about jury capability, and other matters above litigants' rights to a day in court and jury trial. Thus, he suggests that judicial restraint as well as further Supreme Court guidance is needed to prevent trial courts' discretion from eclipsing these fundamental rights of litigants.

151. *See* Section II.D and accompanying notes.

152. Fed. R. Civ. P. 56 (a).

153. *See* Carmine Punzi, Giudizio di Fatto e Giudizio di Diritto 149 (2022). This point must be more exhaustively specified to clarify why comparison makes sense also from this perspective. Given that the requirement to enter in summary judgment upon parties' request is the evidence of no controversial material facts as the reason to justify the unnecessary trial and jury's role, the *iura novit curia* application (as it derives principally from the art. 101 Italian Constitution) as the exclusive judge's power in deciding the case means that the 2022 new provisions for a summary adjudication unavoidably ground on unquestionable facts, as emerged throughout the preliminary phase on pleadings and amendments.

from repeating the drifts that emerged from domestic evaluations of some aspects of the U.S. legal system: one of these drifts is notably the criticism of the extensive use of summary judgment in practice[154]

The growing use of the summary judgment by courts has resulted, in many cases, in significant costs and remarkable delays for the parties because of how long lawyers spend preparing motions for summary judgment and replies to opposing parties' motions.[155] This is an important phenomenon when comparing the American and Italian systems and considering the "Americanization" of the Italian system as a result of the Reform.

The main critique of the new Italian summary adjudication relates to the judge's duty to respect the right to be heard before the summary adjudication. This duty implies a sub-proceeding, established *sua sponte* by the judge, that unavoidably takes time, incurs costs on parties, and substantially overlaps with the standard form of adjudicating disputes. This critique is even more compelling when one takes into account that standard adjudication could already be quick and final even prior to the Reform, thanks to existing rules that allow for a prompt resolution by the judge during the adjudicatory phase.[156]

If there was no need to proceed to discovery and fact-gathering since the set of facts are not disputed, the Italian system already had a quick way to go to a final and binding decision, formally structured in terms of the right to be heard, and binding in terms of *res judicata* (and constitutional guarantees).[157]

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154. *See* Miller, *supra* note 144, at 1045–48 (summarizing criticisms of summary judgement).

155. Wood, *supra* note 144, at 232 (quoting *See* D. Brock Homby, *Summary Judgment Without Illusions,* 13 Green Bag 2d 273, 273 (2010)). *See also* John Bronsteen, *Against Summary Judgment,* 75 Geo. Wash. L. Rev. 522, 551 (2007) (discussing inefficiencies of summary judgement procedure).

156. Codice di procedura civile, Art. 281–sexies (It.) provides for expedited adjudication. According to this provision, the judge may order an oral discussion of the case and deliver a judgment immediately afterward. This approach is more expeditious because, in Italy, the usual procedure involves each party filing two final submissions, with a decision made without an oral hearing. The ordinary process typically takes several months and is very time-consuming.

157. Reference is made to Art. 187, para. 1 of the Italian Code of Civil Procedure that provides "when the investigating judge considers the case ready to be decided on the merits without the need to admit additional evidence, the judge remands the parties to the panel of judges." Para. 2 further provides

Accordingly, Americanization should also caution the post-reform Italian system against encouraging using tools such as summary judgment in the name of a misunderstood goal of judicial efficiency. Moreover, under the new Italian system, summary adjudications do not carry a *res judicata* effect. This contrasts with the U.S. practice, which recognizes *res judicata* effect for summary judgments. The possibility in Italy for the losing party to re-litigate the same proceeding may result in additional expenses and a burdensome legal processes.[158] From this perspective, the Italian summary judgment could be even more detrimental than the American one.

IV. Conclusion: Values, Policies, and Cross-Comparison

While a purely technical comparison reveals similarities between the Italian civil proceedings after the Reform and the

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that "the judge may remand the parties to the panel of judges to have it decide on a preliminary issue on the merits of the case when the decision of this issue may define the whole case." Para. 3 then notes "the judges proceed similarly in case of issue dealing with jurisdiction or venue or in cases of other prejudicial issues; however, the judge may also decide that these issues be decided when deciding on the merits of the case." For a translated version see Grossi & Pagni, supra note 28, at 210–11.

158. *See* Cesare Cavallini, *Anglo-Saxon Res Judicata Culture For Civil Law Systems*, 45 Nw. J. Int.'l L. & Bus. (forthcoming 2025). ("Providing the summary adjudications, the civil law (Italian) legal system endorses the (legitimate) role of the judiciary in guaranteeing the just result for parties in dispute resolution whenever the winning one is satisfied and the losing is demotivated to relitigate the case. The combined effects of the satisfactory results as they emerge de facto from the judge's prompt decision definitively shape these summary adjudications. The ground comes from the full respect of the due process majors, as they are commonly shared between the two legal families"). *See also* Stefania Cirillo, *«Efficacia» e «Autorità» della Sentenza nel Prisma della Riforma del Processo*, 2 Rivista di diritto processuale 557 (2024) (explaining how the incentive for a party to restart proceedings from the beginning, based on the same claim for which they were previously unsuccessful, appears minimal. This is because if the losing party chooses to initiate a new proceeding from scratch, they should reasonably expect that another judge, presented with a comprehensive trial – including the well-reasoned order, even if this order was not *res judicata*—and the claim already deemed clearly without merit, would most likely uphold the original ruling. This is particularly evident when considering that the new proceeding concerns the same facts, rather than a direct challenge to the prior decision. From the perspective of Law and Economics, one might argue that the disincentives to restart the proceedings are so substantial that they effectively justify the abandonment of *res judicata*).

U.S. system, our discussion of the "Americanization" of the Italian system after the Reform implies something more than mere convergence. This "something more" requires integrating criticisms of the U.S. system into discussions of the contemporary Italian system. This highlights potential pitfalls of the Reform, or further changes to the Italian system intended to further its "Americanization."[159] It has been long debated in Italy on how a new civil justice reform could efficiently model civil procedure. The same debate arose for at least two decades in the United States.[160] Generally, this debate centered around the question of whether transplanting foreign rules and procedural devices could enhance efficiency in civil justice administration and effectiveness in issuing the fairest decision.[161] Despite the failure of the transplant methodology because of its political orientation,[162] comparative law ultimately stems from the proper way to implement reforms in civil justice. Future comparative studies should look at specific frameworks of foreign systems, focusing on their purposes and the policies that inspire their current use and interpretation of domestic rules.

The impact of the Italian Reform is a ripe case for comparative analysis through the lens of "Americanization." The renewed Italian civil proceeding was not formally inspired by the American legal system of civil procedure and justice. Yet as Professor Hershkoff observed, the "judicial reforms would seem to track many salient features of U.S. civil procedure," such that their comparison raises important questions about the nature and conception of legal transplantation.[163] Thus,

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159. Helen Hershkoff, *An American's View of "The Americanization of the Italian Civil Proceeding?": Procedural Convergence, Strategic Signaling, and Democratic Practice*, 57 N.Y.U. J. INT'L L. & POL. 53, 59.

160. *See* Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 251–52 (2004) (comparing the U.S. system of judicial review to other countries' systems to highlight potential areas for reform); Hiram E. Chodosh, *Reforming Judicial Reform Inspired by U.S. Models*, 52 DEPAUL L. REV. 351, 366, 377 (2002) (analyzing weaknesses in the "export" of U.S. civil justice reform to developing countries).

161. *See generally* WATSON, LEGAL TRANSPLANTS, *supra* note 79 (arguing that cross-cultural legal borrowing is the most common form of legal development).

162. *See* Pier Giuseppe Monateri, *The 'Weak Law': Contamination and Legal Cultures (Borrowing of Legal and Political forms")*, 13 TRANSNAT'L L. & CONTEMP. PROBS., 575, 575 (2003) (citing politically-motivated efforts by western governments leveraging transplant methodology to "export" their legal systems to former Socialist countries).

163. Hershkoff, *supra* note 159, at 65.

our discussion about the Americanization of Italian civil procedure through the Reform illustrates the use of a comparative approach that focuses on the complementary and harmonizing aspects of both systems. A second step of this comparative methodology stems from a cross-examination of different ways that each State has structured their civil justice administration. This cross-comparison puts both systems into conversation with one another, underscoring how drawing inspiration from one means recognizing the pitfalls of both.

The most important takeaway from such an analysis of the Italian Reforms is that the American system has influenced one of the most rigid civil law systems: the Italian one. This is part of a larger trend and is an opportune occasion to rethink cornerstones of the American civil procedure, and to ensure that the Italian system does not fall into the same traps that the American one has.