Just about Dispute Resolution?

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I. My research stay at NYU Law School for the academic year 2014/2015 is (partially) financed by the Italian project of national interest, PRIN 2012, “Codification of EU Administrative Procedures”, no. 2012SAM3KM, (team leader: Prof. Jacques Ziller, University of Pavia) and aims at advancing my knowledge about the features of the U.S. judicial system which are most far away from those of a judicial system belonging to the civil law area.

The features I plan to investigate are: economics of litigation, alternative dispute resolution, coexistence of two separate and independent systems of courts (federal courts and state courts), broad field of disputes (encompassing public law matters) which can be brought before the court through a civil action, differences between U.S. due process clause and European fair trial guarantee, pre-trial discovery (and e-discovery), trial by jury, punitive damages,
class actions, American rule about attorney’s fees and costs of litigation, contingency fees.

Such a broad research program will certainly require a few years to be reasonably carried out, but I hope to lay down some fundamental layers this year and to get the opportunity to pursue my research project through further research stays.

II. This research proposal might be justified in the light of the objective I am trying to achieve at this stage of my academic career. I spent the first twenty five years (1984-2009) dealing with “classical” topics in the field of civil procedure according to civil law tradition: res judicata, structure of proceedings, interplay between judicial powers and powers of the parties, role of Supreme Courts, summary proceedings and provisional measures, et cetera.

In recent years I have been broadening my interests to the constitutional settings of the administration of justice, the dialogue between national and international (or supranational) courts, the European law of civil procedure, the fair trial guarantee in transnational litigation.

Now I feel the need of doing a preparatory work for an essential turn in my research activity towards a comparative approach in the study of civil procedure and justice.

To be sure, I had frequently adopted comparative perspectives in my works, but over time I became fully aware of their shortcomings. First of all, I had focused my comparative efforts on specific aspects of civil proceedings, without paying enough attention to the “big picture”, i.e. the interplay between them and the judicial system of which they are components, so forgetting that:

"Each system functions as a whole. Its general tendencies depend on the interaction in concrete situations of all the elements discussed [...] only after analyzing for each system the full range of historical, institutional, and social fact here considered, can comparative generalizations be offered".1

Secondly, I didn’t have paid enough attention to the relationship between legal system and the moral and cultural dimension (beliefs, mentality, ethical assumptions and cultural trends) affecting citizens and professionals involved in various ways in the machinery of justice.2

Thirdly, I have been seeking for comparisons (almost) only within the European legal tradition, mainly in Germany. As a global result of those shortcomings, some elements of the judicial systems belonging to the civil law area, which are rather the outcome of

certain historic developments, came to appear to me as something ‘natural’ and inherent in the judicial system as such.

Dealing intensively with some distinctive features of the U.S. judicial system, which at times have led to the coining of the expression “American exceptionalism”, can be very useful in order to get rid of the impression that the legal systems of the continental European countries are the “centre of the world” as far as civil justice is concerned.

But, at the same time, it might point to some shortcomings of the U.S. judicial system as well.

III. In the long run (maybe five/eight years) deliverable is a book, a kind of manual on comparative civil procedure (not more than 400/500 pages long), only for academic purposes (for law students, not for practising lawyers) to be possibly adopted in law schools around the world and to be read along with materials about domestic civil procedure. Probably I will feel the need of advancing some chapters in form of working papers in order to get hints and comments from colleagues and interested lawyers.

It might be possible for me to write a book like that, about the “western tradition” in the field of civil procedure, structured along the nine/ten fundamental topics in this field (courts system, legal profession, pleading, facts and gathering of information, parties, jurisdiction, structure of proceedings, provisional measures, res judicata, alternative dispute resolution), building up on my Italian origin (which allows me to understand French, Spanish and Portuguese languages), on my German years (I used to work at German universities for four years) and on my current experience in the United States.

It might be even truer for civil procedure what Arthur T. von Mehren put with regard to the comparative analysis of the problem of form:

“[C]omparative study [...] analyzes and seeks to understand richer and more complex material than is encountered [...] in a single legal system. Moreover, when several legal systems are studied, different intellectual orderings of what is - economically and socially considered - essentially the same subject matter are frequently encountered. The variety of phenomena to be analyzed and comprehended for comparative research stimulates the imagination”.4

One may go even further in referring von Mehren’s words to the research activity in the field of civil procedure. As with the topic of formal requirements, the comparative study of civil procedure

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“well illustrates how the juxtaposition of different intellectual structures or systems and the diversity of the materials to be analyzed and understood leads to a search for unifying theories that explain the significance of - and the reason for - divergent solutions and traditions⁵ and “enables us to formulate general laws without having to abstract the specificities”.⁶

IV. As my research is at its initial stage, I’ve chosen to present at the Global Fellows Forum initial comparative remarks on two specific topics:
(a) Due process or (in European language) fair trial;
(b) Alternative between litigating before the courts and making use of alternative dispute resolution methods.

V. The original formulation of due process derives from the clause 39 of the Magna Carta Libertatum:

“Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae”.⁷

The key point of this concept was a limitation on the power of the royal sovereign that granted legal protection to the life, liberty and property of English freemen.⁸

The concept of due process underwent transformation when the American colonists adapted the Magna Carta as a limiting principle not only on the use of executive power, but also on the scope of the laws that could be passed by the legislature.⁹

There are five basic elements of due process that may be derived from American case development: notice, hearing, right to an impartial arbiter, right to be represented by counsel, and right to timely resolution of claims.

As Issacharoff put it:

“The articulation of these elements of due process leaves unanswered a central question dating from the time of the Magna Carta: what is the purpose of these due process rights? That is, we know what we are

⁵ A. von Mehren, Formal Requirements (n. 4), p. 5.
⁷ This is the second and most famous of the three surviving chapters of the Charter. It is Edward I’s version (1297) which remains on the statute books to this day. See Lord Neuberger of Abbotsbury, Inner Temple, Magna Carta Dinner, 14 June 2011, http://tinyurl.com/6fztms; W. Holdsworth, A History of English Law, 4th ed., 1936, p. 214.
⁹ S. Issacharoff, Civil Procedure (No. 8), p. 4.
supposed to do, but, without understanding why we do it, we still are unable to establish how much process is due process. To determine how much process is due, we need a clearer understanding of the purpose of due process than the necessarily open-ended formulation the Constitution provides. The constitutional due process principle can be understood in two different ways: as a guarantee creating a distinct set of rights among the citizenry, or as a constraint designed to prevent arbitrary governmental action”.10

Against this background, Issacharoff goes on characterizing the development of twentieth century due process law as passing through three central phases: substantive due process, procedural due process and due process functionalism.11

VI. If you look at these developments from a European perspective, you can’t help remarking that the current U.S concept of due process, in spite of all changes it has undergone, is still strongly influenced by the original meaning enshrined in the Magna Charta Libertatum, i.e. it is conceived as freedom from unlawful interferences by the public authority, today as a negative limitation on what the state may do to its citizens.

The central question left unanswered by this notion is what is the affirmative role of the state that the constitutional order assumes in this field.

This question is addressed by the European concept of fair trial, as it came to encompass the right to access to the courts.12 The judgment adopted by the European Court of Human Rights (ECrtHR) in 1975 in the case Golder v. United Kingdom is supposed to be a landmark decision in the area. The applicant, a prisoner, was prevented under the rules then in force from consulting a solicitor in relation to defamation proceedings he wished to bring against a prison officer. He indeed did not pursue his aim. The Court held (by nine votes to three) that there has been a breach of Article 6 para. 1 of the European Convention of Human Rights;

One could object that there is no difference between the U.S. due process and the European fair trial, as the right to be represented by counsel is also covered by due process. Yet it is interesting to follow closely the reasoning of the Court in his effort to generalize the question, moving somehow away from the facts of the case:

(Para 25) “Is Article 6 para. 1 (art. 6-1) limited to guaranteeing in substance the right to a fair trial in legal proceedings which are already pending, or does it in addition secure a right of access to the courts for every person wishing to commence an action in order to have his civil rights and obligations determined? [...] (para 26) By forbidding Golder to

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10 S. Issacharoff, Civil Procedure, (No. 8), p. 5.
11 S. Issacharoff, Civil Procedure, (No. 8), p. 6-10.
make such contact [with the solicitor], the Home Secretary actually impeded the launching of the contemplated action. Without formally denying Golder his right to institute proceedings before a court, the Home Secretary did in fact prevent him from commencing an action at that time. [...] (para 28) Article 6 para. 1 (art. 6-1) does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right. [...] (para 31) The terms of Article 6 para. 1 (art. 6-1) of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth. [...] (para 35) Were Article 6 para. 1 (art. 6-1) to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. [...] “It would be inconceivable [...] that Art. 6 para 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings”.

By including the right of access to the courts within the notion of a fair trial (Art. 6, para 1 of the European Convention of Human Rights, ECHR), the Court paved the way for a change in the European perception of the fair trial, shifting it from the sphere of limitations on the state activity towards the sphere of positive obligations on the State.

VII. Few years later the right of access to the courts was placed in the broad framework of the “access-to-justice movement” by Cappelletti in its world survey:

“Effective access to justice can [...] be seen as the most basic requirement – the most basic ‘human right’ – of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all”.13

Cappelletti saw that barriers to justice are many and often interrelated, but they are most evident for small claims and for isolated individuals, especially those of limited means and a complex strategy is needed in order to overcome them. Accordingly, the movement for access to justice is supposed to be characterized by three “waves”. The first wave consists of developing mechanisms to provide legal aid. The second wave is the move to give representation

to “diffuse” collective interests and/or to protect “homogeneous”
individual interests through mechanisms such as class actions and
granting standing to sue to consumer and environmental
associations. The third wave consists of the simplification of
proceedings and the development of alternative methods of dispute
resolution.

The distinctive feature of Cappelletti’s approach is that only the
harmonic and proportionate combination of the three waves can
effectively and efficiently respond to the demand for justice from
society.

VIII. In the meanwhile the European Court of Human Rights
developed its case law in this field, implementing the principle of
“effectiveness”. In Airey v. Ireland (1979), the European Court of
Human Rights applied the principle of effectiveness to the right of
access to the courts, arguing that this right cannot be effectively
protected without providing for legal aid on the part of the State:

(Para 24) “The Convention is intended to guarantee not rights that are
theoretical or illusory but rights that are practical and effective [...] This is
particularly so of the right of access to the courts in view of the prominent
place held in a democratic society by the right to a fair trial”. (Para 25) “In
the first place, hindrance in fact can contravene the Convention just like a
legal impediment [...]. Furthermore, fulfillment of a duty under the
Convention on occasion necessitates some positive action on the part of the
State; in such circumstances, the State cannot simply remain passive [...].
The obligation to secure an effective right of access to the courts falls into
this category of duty”.

IX. Following further judgments by the ECtHR, other positive
obligations besides the provision of legal aid have fallen within the
area of the fair trial guarantee. In particular in the landmark
decision of Hornsby v. Greece (1997) Art. 6, para. 1 ECHR was
extended through the introduction of the right to effective
enforcement of judicial decisions. In Hornsby the Greek Ministry of
Education wrongly refused to allow the applicants to set up a private
school. The Supreme Administrative Court quashed the Ministry’s
decision but the Ministry refused to act in accordance with the
judgment. The Court reiterated that, according to its established
case law:

(Para. 40) “Art. 6 para. 1 secures to everyone the right to have any claim
relating to his civil rights and obligations brought before a court or
tribunal; in this way it embodies the ‘right to a court’, of which the right of
access, that is the right to institute proceedings before courts in civil
matters, constitutes one aspect [...]. However, that right would be illusory if
a Contracting State’s domestic legal system allowed a final, binding judicial
decision to remain inoperative to the detriment of one party. It would be
inconceivable that Art. 6 para. 1 should describe in detail procedural
guarantees afforded to litigants - proceedings that are fair, public and
expeditious - without protecting the implementation of judicial decisions; to construe Art. 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention [...]. Execution of a judgment given by any court must therefore be regarded as an integral part of the ‘trial’ for the purposes of Art. 6; moreover, the Court has already accepted this principle in cases concerning the length of proceedings”.

X. The right to effective judicial protection of rights also requires an effective remedy, guaranteed by Art. 13 ECHR, which extends beyond the safeguards provided for by Art. 6. The leading case here is Kudla v. Poland (2000):

(Para 157) “Art.13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an ‘arguable complaint’ under the Convention and to grant appropriate relief”.

These developments are now condensed in Art. 47 EU Charter of Fundamental Rights:

(1) “Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. (2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. (3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

XI. One of the most striking consequences of the difference between U.S. due process and European fair trial/access to justice guarantee is correlated with the alternative between litigating before the courts and making use of alternative dispute resolution methods. From the U.S. perspective it appears to be weird discussing that alternative within the framework of due process discourse. In Europe rather the opposite is true.

Only the starting point is the same on both sides of the Atlantic. A key element of the western political culture places the rights of the individual at the centre of economic, social and legal activity. From the central position of the individual arise the principles of party autonomy and party disposition as those shaping dispute resolution methods and their features.

Accordingly it is the parties and not the state, who should in principle choose the dispute resolution mechanism along with its commencement, scope and termination. Therefore, it is for the
parties and not for the state to choose the suitable dispute resolution mechanism along with its commencement, scope and termination.

As far as the relationship between adjudication and out-of-court settlement is concerned, the great debates on mediation in the mid-1980s in the US and mid-1990’s in Europe as well as the subsequent implementation of mediation programs in both areas was an essential turn in the landscape of dispute resolution in western countries. Before the institutionalization of mediation in the western countries settling a dispute through an out-of-court agreement or litigating the case before courts and seeking adjudication was an individual choice of the parties even if they could occasionally decide to be assisted by a mediator. After the large scale development of mediation schemes, the alternative between settlement and adjudication is rather an institutional choice, supported by a number of policies.14

In the U.S. institutional settings clearly point to settlement, rather than adjudication. The U.S. judicial system keeps functioning because about 95 percent of pending lawsuits end in a pre-trial settlement. This is not without a cause, as Issacharoff put it:

[Litigants] “are clear losers as soon as they enter the litigation process. Litigation ensures that the disputants collectively are worse off than they were before. Whatever the stakes in a dispute between two parties, there is only one way in which they can preserve their joint welfare. Any division of the stake between them [...] leaves the parties jointly in the same position as when they began their dispute: however they slice it, they will still have the entire pie to share. It is only by bringing lawyers into the mix and by subjecting themselves to the inevitable costs of litigation that the parties consign themselves to being worse off.”15

This remark is incontrovertible, but Issacharoff concludes his book drawing our attention to the “self-serving bias” of the parties, assessed by empirical studies: rather than bringing parties together, sharing common information can provide a fertile environment for disagreement and inefficient impasses, because parties tend to integrate new information about factual and/or legal aspects of the dispute in a self-serving fashion.

XII. It is worth asking whether just the “self-serving bias” of the parties can somehow strengthen the position of the State as a provider of dispute resolution services.

At this stage the European notion of fair trial/access to justice can make the difference.

In a polity committed to the principle that relationships among its citizens must be governed by a system of law and not by the

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15 S. Issacharoff, Civil Procedure (No. 8), p. 199.
“survival of the fittest” or the toughest in negotiating his/her case, the fair trial/access to justice guarantee seems to be able to set limits to the principles of party autonomy and party disposition.

According to Adolf Wach (needless to say: one of the most influential German scholars in civil procedure of the XIX century):

“There must be norms ruling what parties are allowed to do and what they aren’t, as well as norms ruling what they aren't allowed to do, although they are mutually ready to allow it”.16

While Wach’s liberal approach is concerned with the regulation of court proceedings, it is worth extending it to the choice between litigating before courts and alternative resolution of the dispute.

Since the government is involved as a provider of dispute resolution services, it has a duty to implement policies. The most fundamental policy is to enable the parties to choose dispute resolution methods in a truly free and informed way and to remove various barriers to justice that may exist.

It may well be that there is no general preference for one dispute resolution mechanism over another (courts proceedings, arbitration, mediation, negotiation between the parties themselves, etc.).17 Furthermore, there may well be no preference for one dispute resolution yardstick over another (adjudication or interest based resolution). Finally, it may well be the case that “court proceedings are not better or worse than alternative dispute resolution procedures, they are simply suited for some disputes more and for other disputes less suited”.18

However, the inverse also applies: there is no general preference of alternative dispute resolution over resolution that has been forced on (one of) the parties, even in situations where all involved have consented. In any case, litigation before state courts should not be only a last resort. Court proceedings, and ultimately judicial decisions, may be necessary and appropriate not only where the parties to the dispute disagree on making use of an alternative dispute resolution method, but also if there are public interests at stake that prevail over the agreement of the parties.

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18 F. Steffek (No. 17), p. 15.
XIII. It is worth pointing out which features of the fair trial/access to justice guarantee are more relevant for the regulation of alternative dispute resolution methods.\textsuperscript{19}

The relationship between alternative dispute resolution and the right to effective judicial protection of rights has indeed figured prominently in the reasoning of the Court of Justice of the European Union in \textit{Alassini} (2010), according to which the principle of effective judicial protection does not preclude mandatory out-of-court settlement proceedings,

“Provided that that procedure does not result in a decision which is binding on the parties, that it does not cause a substantial delay for the purposes of bringing legal proceedings, that it suspends the period for the time-barring of claims and that it does not give rise to costs – or gives rise to very low costs – for the parties, and only if electronic means is not the only means by which the settlement procedure may be accessed and interim measures are possible in exceptional cases where the urgency of the situation so requires”.

It is clear that the purist form of mediation is that of a voluntary, consensual process in which the parties are assisted to reach settlement. Mediation is therefore most appropriate and successful when the parties enter the process voluntarily. The readiness of parties to mediate is an important factor in settlement. Cases are more likely to settle at mediation if the parties enter the process voluntarily rather after being pressured into the process.\textsuperscript{20}

Yet, this is not a perfect world. Not everybody is fully aware of the options at his/her disposal and can make choices on a rational basis that reflect the full range of possibilities. On the other hand, parties are often unaware of the costs of adjudicating the case and the considerable length of civil proceedings. Moreover, parties are frequently unaware of the possibility of mediation. In order to enter into mediation voluntarily parties need to know about this method of solving disputes. Introducing mandatory mediation processes (‘mandatory’ in the sense that it is an obligatory step before going to the courts), at least for a limited period of time, could be an appropriate policy aimed at enabling parties to make an informed choice regarding the dispute resolution mechanism. This provision could spread awareness of alternative dispute resolution methods and encourage parties to employ them.

XIV. A second element of the relationship between alternative dispute resolution and fair trial/access to justice guarantee is the judicial review of mediation proceedings.


\textsuperscript{20} H. Genn, Judging civil justice, 2010, p. 113.
A pivotal distinction should be made between adjudication as well as arbitration on the one hand, and mediation proceedings on the other.

In arbitration and in judicial proceedings the parties as a rule do not have control over either the content of the act solving the dispute or its binding effect. They are bound by judicial decisions or arbitral award, without being able to determine their content by consent. Judicial review of arbitration proceedings is therefore required.

In contrast, in individual mediation processes parties have joint control over the content of the act resolving the dispute (they determine the terms of settlement agreements) as well as over its binding effect (settlements become binding for the parties after they have determined and agreed on the content of them). Judicial review of mediation proceedings is accordingly superfluous: if there are procedural flaws, the parties may decide not to agree on the terms of settlement. If the parties decide to settle the dispute in spite of procedural flaws of mediation agreements, such flaws don’t matter, except if there are circumstances such as defects of will that may render the agreement ineffectual much like under the ordinary law of contract.

In this context, it doesn’t matter whether the parties have joint control over the initiation of the mediation processes or not. The same rule (no judicial review of individual mediation processes) applies, even where the parties have been forced to enter into a mediation process in the context of a dispute that is not subject to mandatory mediation. Even if it is apparent that a procedural flaw has occurred there is no room for setting aside the agreement if the parties have reached an effective settlement.

However, institutional settings and public oversight should reduce as much as possible the risk that the absence of review of the lawfulness of mediation processes might give rise to a high number of unlawful mediation processes.

As far as collective, rather than individual, mediation processes are concerned, the most efficient solution is granting participants only an opting out right in relation to a (mass) settlement agreement whose terms are negotiated by representative organisations and approved by the court, such as provided by the Dutch Act on Collective Settlements (WCAM). In such a situation, only the negotiating representative organisations have control over the terms of mass settlement agreement. An individual member of the class has control only over the binding effect of settlement on him/her.

XV. However the relationship between alternative dispute resolution and fair trial/access to justice guarantee may be described, it is clear that the constitutional concept of courts as a basic public service provided by government is, as Judith Resnik recently pointed out, under siege:
“Pressures come from the demands imposed by the host of new claimants who, because of twentieth-century equality movements, gained recognition as rights holders; from institutional defendants arguing the overuse of courts and proffering alternatives; and from competition for scarce funds in government budgets”.21

Against this background, as far as western countries are concerned, “we have been presented with two competing narratives about civil justice: that there is not enough access to justice and that there is too much litigation”22.

There are two possible ways out of the crisis: either broadening access to justice (not only more judges, courthouses and taxes to finance this, but also “multi-door” courthouses, along with new alternative dispute resolution methods) or reducing the courts’ workload (keeping unaltered the capacity of the judicial system). It goes without saying that they appear to be opposite solutions.

The secret to the success of private dispute resolution processes, in particular mediation, is that they can serve both purposes, depending on the stories being told about access to justice and alternative dispute resolution methods.

First of all you can tell the Cappelletti’s story, which in a nutshell looks like the following: avoiding (or terminating) litigation before the courts through a settlement (renouncing the articulation of legal norms through adjudication) does not necessarily mean giving up the goal of dealing with the case justly.

It is not by chance that the development of alternative dispute resolution methods has been placed in the framework of the above mentioned “access-to-justice movement”.

As U. Mattei put it:

“Cappelletti’s work [...] witnessed a moment of general optimism in the public interest model, an idea of an activist, redistributive, democratizing, public-service-minded approach to the public sector in general and to private law in particular. In this intellectual mode of thought, the Welfare State in Western Societies was seen as a point of arrival in civilization, and access to justice was the device through which communities could provide law as a public good, after having provided shelter, healthcare and education to the needy.”23

Beginning in the early eighties, the global ideological picture had changed.

“Neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain, [..] and imported on a much weaker institutional background in Reagan’s America, were based on the very basic assumption that the welfare state was simply too expensive. [..] Public shelter, health, education and justice for the poor were the natural “victims” of such budget cuts”. 24

The turn to neo-liberal policies has had an influence on the development of alternative dispute resolution methods, cutting off their relationship with the idea of access to justice and marked the beginning of another story. Faced with this new political environment, mediation has increasingly been employed as a mean to cut the costs of the state civil justice as well as to reduce the caseloads of courts.

However, it is not true that there is “too much” litigation just as it is not true that there are too many sick people or too many people who want to make use of public transport.

There can be courts or hospitals that are unable to cope with their caseloads and patients.

To relieve these imbalances between supply and demand of public services, governments can either boost supply, if there are enough resources to do so (which does not appear to be the case at present), or they can implement more long term policies and adopt measures in order to mitigate the social, economic and legal conditions that give rise to litigation. In the context of the latter solution, promoting mediation, through proper education of the public and the legal profession, can play a major role in supplementing courts.

It should be clarified that mediation should not be seen as a remedy for the inefficiencies of the state machinery of justice. Instead, it should have an “added value”, even though courts work effectively and efficiently. The promotion of mediation should always be accompanied by efforts to improve the efficiency of public civil justice system and not by attempts to limit access to courts.

XVI. Thus the adjective “alternative” is misleading in relation to out-of-court dispute resolution methods. The out-of-court dispute resolution methods ought not to be an alternative to the state civil justice system, but rather complementary because: (a) they are not available in all types of disputes; (b) they need the public machinery of justice, if (b1) the settlement agreement is not complied with or (b2) a provisional measure is needed to protect a right (especially of a weak party) involved in the dispute.

Taking the interrelationship between the state civil justice system and out-of-court dispute resolution methods into account allows one to determine those types of disputes that are better suited than

others to be resolved through mediation, instead of being resolved through legal action before the courts.

A first group concerns cases where the parties are members of a group or maintain a long-term social or economic relationship. The civil process is intended to ascertain the past and, as a rule, does not take into account the future. For this reason it often results in a definitive break between the parties. On the other hand mediation can broaden the perspective and help maintain future relations between the parties.

A further kind of disputes concerns small claims. Allegedly, small claims, especially in the field of consumer protection, are well suited for alternative dispute resolution methods. Here the average length of the proceedings and the counsel’s fees are disproportionate in relation to the small value of the dispute. As a result the consumer often does not claim his right before the courts. One could imagine in such a case that mediation is a more cost-effective alternative to filing a lawsuit.

However in a lot of cases consumers injured by an illegal act are many and fall into a class. When there are issues of law or fact at stake which are common to the class, and the claims are typical, the most efficient solution is not an individual mediation but a class action eventually followed by a collective mediation. In other words, if there are issues common to a group of claims, the most efficient solution is a court-based mechanism that aggregates such a group of individual cases. If the damages suffered by each member of the class are mild, an individual judicial lawsuit is certainly not advisable but neither is individual mediation. Rather a class action is more convenient. The latter costs the individual consumer less time and money than the individual mediation. The class action encourages consumers to claim their rights.

Yet, if the costs for the recovery are greater than the value of the sum to be recovered (if this is really very small), it is preferable to confiscate the profits of the company unlawfully acquired (“skimming off excess profits”), as is the case under the German Gesetz gegen den unlauteren Wettbewerb.25

In addition, class actions organize a collective response by the consumers against the company’s wrongdoing. Therefore this reaction has a deterrent effect against the company which is of much greater than that of a consumer’s individual lawsuit. Moreover, class actions serve to improve the functioning of mediation by

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25 Gesetz gegen den unlauteren Wettbewerb, UWG, § 10, Gewinnabschöpfungsklage. It is a remedy aimed at depriving anyone who unfairly distorted competition of illegal gains. In the course of a recent reform of the German Gesetz gegen Wettbewerbsbeschränkungen, GWB, skimming-off actions have also been introduced into German antitrust law. See GWB § 34a, for which UWG § 10 served as a model.

The current problem is that the consumer associations, the only having standing to bring such proceedings, don't have enough incentives to sue, as they have to bear the costs of proceedings, without prospect of return.
strengthening the position of the weaker party, the consumer. He or she can refuse to enter into an unfair agreement, because he or she may well be aware that an effective remedy is available before the courts.

To cut a long story short: in light of the fair trial/access to justice guarantee, an effective and efficient machinery of public justice is necessary to minimize the risk that unequal bargaining power between the parties might give rise to instances of unjust settlements.

This is especially the case in the field of consumer protection in Europe, as a system of dispute resolution with its own institutional structure independent of the courts is about to rise.26

XVII. The last point made, about class actions, paves the way for a few concluding remarks. They are actually concluding as far as this paper is concerned, but they are opening remarks as to the future developments of my research activity.

The institutions of civil justice play fundamental social and political roles in the life of a polity. It is not only a matter of protecting individual rights. Nor simply is it a matter of restoring peace between the parties to a dispute. As Cappelletti put it:

“Procedural law is not just about techniques - methods to regulate the business of courts. Procedural law, in the first place, details the role of government, through public courts, in settling disputes, creating new substantive rules and policies, and implementing policies through law. Important public policies are at stake in decisions about when to encourage parties to litigate, how to shape their factual and legal claims, and whether to promote a strictly legal resolution as opposed to a negotiated settlement. How much law regulates social behavior depends in large part on how the machinery of justice is constructed”.27

This holds true not only in the United States, where the system of private civil justice has been seen from the outset as an important element in the effective regulation of social and economic actors 28, but is increasingly true also in Europe, although traditionally in Europe private litigation before the courts is generally not intended to supplement the public regulation of economic and social actors.

Certainly the basic structures of civil justice systems (both in civil law and common law countries)29, from standing to sue to

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29 As to the common law cf. S. Issacharoff, Civil Procedure (No. 8), p. 65, p. 91.
adjudication, still bear traces of their historical foundation in natural law theory and were aimed at protecting the “new bourgeois individual” and his economic freedom, in a fragmented and individualistic perspective of social relationships. As a consequence of adopting this approach the civil justice systems over a long period of time had significant difficulties in dealing with public interests related to the litigation.

However, public policy goals were also embodied in the functioning of the machinery of justice in Europe.30 As polities embodying the rule of law, European states are committed to the principle that relationships among citizens and their government are to be governed by a system of public and private law, fairly applied and evenly enforced.

This is the primary purpose of the civil justice system. The resolution of private disputes according to the norms of law is derived from this.

The determination and enforcement of private rights leads to the ongoing development and improvement of the law itself. The law is preserved in judgments, and only judgments can develop and propagate the law.

A further example of the presence of public policy concerns can be seen in the regulation of transnational litigation by the European law of civil procedure. It is the underlying rationale of the Brussels Convention on Jurisdiction and Enforcement of judgments in civil and commercial matters. The Brussels Convention of 1968 not only serves the interests of the parties involved in a cross-border dispute in Europe, but it should also be considered in the broader context of European integration. Thus, the “sound operation” of the internal market represents the public policy goal that led to the adoption of rules of judicial jurisdiction intended to be both highly predictable and to simplify the enforcement of judgments in the Member States.31

Moreover the idea of implementing forms of aggregate litigation in the courts as a means for providing not only individual relief to injured parties but also deterrence of harmful illegal acts against a

30 H. Genn, Judging civil justice (No. 20), p. 78.
31 ECJ 10 February 1994 - Case C-398/92, Mund & Fester [1994] ECR I-474 is a landmark decision on the link between the Brussels Convention and European integration. The Maastricht Treaty placed judicial cooperation within the competence of the Justice and Home Affairs Pillar of the European Union (the so-called third pillar). The Amsterdam Treaty amended Art. 65 of the EC Treaty to give the Community competence for “improving and simplifying ... the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases”. On that basis the Brussels Convention was replaced by Council Regulation EC 44/2001 and the underlying public policy concerns have been widened towards the objective of maintaining and developing an area of freedom, security and justice, where the free movement of persons is ensured. Under the Lisbon Treaty, this subject matter is governed by Arts. 67 and 81 Treaty on the Functioning of the European Union (TFEU).
relatively broad range of consumers is also attracting increasing attention in Europe.\textsuperscript{32}

This new (regulatory) function of the civil justice system can be placed in a historical perspective and contrasted with the classical model according to which the purpose of the civil proceedings is the protection of individual rights. As an “essentially new turn in legal events”\textsuperscript{33}, class action suits constitute a collective reaction of victims against mass torts/mass breaches of contract. They have a deterrent effect that would certainly not be achieved by individual actions before the courts or mediation bodies. In this area the private judicial initiative of victims (private enforcement) supports public efforts to prevent and control the misuse of economic power by business actors. Private enforcement can be conceived as a sort of counter-power that emerges from society, as opposed to the economic power of business actors.

In this sense, the civil procedural laws of European countries having introduced (more or less) a kind of collective redress actions may pursue a new goal, traditionally entrusted to government and public administration in continental Europe: the regulation of business activities that impact not so much on the interests of an isolated individual, but on the interests of a broad number of people. Such a regulatory function should be complementary to the control function of public administration: private enforcement and public enforcement should go hand and hand.

A public interest can finally support the traditional idea of entrusting courts with administrative matters (according to the Italian terminology: \textit{giurisdizione volontaria} or \textit{giurisdizione non contenziosa}). Purpose of the present research is also to verify avenues towards transferring these matters to administrative bodies so as to preserve the courts’ core business, i.e. dispute resolution, or – alternatively - reshaping judicial procedure in light of the codification of administrative procedure at European level. In light of this purpose Prof. Jacques Ziller, University of Pavia, has agreed that my research proposal be part of the project about “Codification of EU Administrative Procedures”.
