

**THE JUDICIAL ATTEMPT AT CONCILIATION:  
THE NEW SECTION 185-BIS  
OF THE ITALIAN CODE OF CIVIL PROCEDURE**

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*This article focuses on recent reforms of the Italian Civil Procedure Code through which a new section 185-bis had been added, providing that the Judge, at the first hearing or until the termination of the evidence-taking phase of the proceedings, may suggest to the parties a settlement or conciliation proposal, when appropriate to the nature and the value of the dispute and the issues of prompt solution at law.*

*The author's intent is, on the one hand, to identify the rationale of the new rule and, on the other hand, to emphasize that unfortunately the new rule does not reverse misfortunes of Italian civil justice, but rather gives rise to many difficulties of interpretation.*

*With this purpose, this article first investigates the distinctive traits of the various attempts at conciliation contained in the Code of Civil Procedure, taking into consideration not only the current version of the rules but also the provisions which have followed one another over time. It follows a detailed examination of the elements of the proposal under sect. 185-bis, as to the timeframe, its discretionary or mandatory nature, sanctions for the party's unjustified refusal as well as the role of the Judge with respect to his or her decision-making function.*

**1. The New Section 185-bis:  
The Settlement or Conciliation Proposal by the Judge**

Law Decree no. 69 of 21 June 2013, also known as the 'Decreto del Fare,' (usually translated in English as 'Action Decree') published in the Official Gazette no. 144 of 21 June 2013, introduced a series of rules with litigation deflationary purposes. Section 77 of the abovementioned Law Decree, titled 'judicial conciliation,' inserted a new rule in the Code of Civil Procedure [hereinafter CPC], namely sect. 185-bis, in its turn titled 'conciliation proposal by the Judge' which in its original version established an obligation for the Court to make a settlement or conciliation proposal to the

parties 'at the first hearing, or until the conclusion of the evidence-taking phase of the proceedings.'

The rule at issue has been deeply modified in the conversion into law of the *Decreto del Fare* (Law no. 98 of 9 August 2013, published in the Official Gazette no. 194 of 20 August 2013), definitively approved by the Chamber of Deputies on last 9 August and entered into force on the day following its publication, that is 21 August 2013. The wording of sect. 185-*bis* CPC, as amended, no longer provides for a mandatory judicial attempt at conciliation, but the possibility for the Judge to make to the parties a settlement or conciliation proposal.

The attempt at conciliation under sect. 185-*bis* applies also to pending proceedings, given the immediate entry into force pursuant to sect. 86 of the *Decreto del Fare* and in accordance with the *tempus regit actum* principle.<sup>1</sup>

It is interesting to note that the same *Decreto del Fare* has reintroduced in the Italian legal system the so-called compulsory civil and commercial mediation. Legislative Decree no. 28 of 4 March 2010 (implementing sect. 60 of Law no. 69 of 18 June 2009 and EU Directive no. 52 of 2008 ) had for the first time provided a general regulation of this form of alternative dispute resolution [hereinafter ADR], but, shortly thereafter, it was declared unconstitutional by the Italian Constitutional Court with decision no. 272 of 6 December 2012.<sup>2</sup>

The new mediation is required by the law as condition for the admissibility of the claim brought by the plaintiff in civil and commercial disputes. In particular, mediation is compulsory in disputes arising in the field of joint ownership, rights *in rem*, division, inheritance, family agreements, *commodatum*, business lease, compensation for damages arising from medical and health liability and for defamation by the press or other means of advertising, insurance, banking and financial agreements. Compared to the version introduced in 2010, mediation no longer covers disputes related to compensation for damages from road traffic or health liability.<sup>3</sup>

Actually, mandatory mediation is not the only mediation known to the Italian legal system. The same Legislative Decree no. 28 of 2010 – before the declaration of

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<sup>1</sup> See Trib. Milano, sez. IX civ., decreto 26 giugno 2013.

<sup>2</sup> The Constitutional Court held that the Legislative Decree no. 28/2010 exceeded the legislative delegation, in so far as it provided for the compulsory nature of the mediation.

The mediation as introduced by Legislative Decree no. 28/2010 has been criticized by many players of the legal professions right from its enactment. Among the critics raised, many complained the existence of the vice the declaration of unconstitutionality is based on. In this respect, the Milan Bar Association and the Union of the Bar Associations of Lombardy have directed their criticism towards the Minister of Justice and the law maker warning from a frustration of the deflationary purposes that the mandatory nature of the mediation would cause.

<sup>3</sup> It is worthwhile to note that the failure to carry out mediation for the disputes arising in the fields specified above must be objected by the defendant or raised by the judge no later than the first hearing, under penalty of forfeiture. However, even in the cases of mandatory mediation, it is always possible to request the Court to grant those measures which, according to law, are urgent and cannot be postponed.

unconstitutionality of 2012 and after the enactment of *Decreto del Fare* – provides for two types of mediation: from the point of view of relations with the civil trial, mediation is divided into *voluntary mediation* and *mandatory mediation* (by law or by order of the Court, as specified below). In particular, voluntary mediation is that chosen by the parties; instead, mediation is mandatory when the parties, in order to take a legal action before a Judge, must have first tried (obviously unsuccessfully) the mediation process.

The rules on mediation recently introduced by *Decreto del Fare* differ from the original version of Legislative Decree no. 28 of 2010: first of all, the law maker has taken the opportunity to insert a criterion of territorial jurisdiction for the submission of the request for mediation;<sup>4</sup> the mediation process can carry on only after the consent of the parties involved has been obtained during a preliminary planning meeting; only such preliminary planning meeting, which must take place within 30 days from the filing of the request for mediation, is an admissibility condition as described above and for the disputes subject to mandatory mediation;<sup>5</sup> in case an agreement is not reached by the parties, they will not be charged any expense for the preliminary planning meeting; the mediation process has been reduced from 4 to 3 months, from the filing of the request for mediation (of from the time limit set out by the Judge); lawyers are now ‘mediators’ at law, being required only to take refresher courses.

Thus highlighted the elements of novelty of the ‘new mediation’ compared to the previous rules of 2010, these are the steps implied by a mediation process: first, in the context of mandatory mediation the party intending to bring proceedings against another party must start a mediation process, with the assistance of a lawyer, who is required to inform him / her, fully and in writing, that in the case at issue mediation is mandatory (layers are in any case required to inform the client of the possibility to start mediation in case of voluntary mediation and about the relevant fiscal

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<sup>4</sup> The request for mediation must be addressed to the mediation body of the place of the Court having jurisdiction for the dispute at issue. In addition to the indication of the mediation body, the request must also specify the data of the parties, the subject of the dispute and the claim. Within the territorial limits referred to above, the parties may choose the mediation body freely and, in case more mediation bodies are contacted, the mediation process takes place before the mediation body that first received a request.

Considering that the rules on jurisdiction at issue concern only territorial jurisdiction, they may be derogated from by the parties by express agreement or tacitly. As a matter of fact, the parties may jointly apply to a mediation body other than that having jurisdiction, or the defendant may regularly accept the mediation process without objecting the lack of territorial jurisdiction.

The request for mediation unilaterally filed before a mediation body lacking territorial jurisdiction has no effect, except in the cases mentioned above.

<sup>5</sup> Please note that some case law have given a strict interpretation, according to which the condition of admissibility is not met if the parties do not participate in the mediation personally and mediation is not effectively started (see Trib. Firenze, sez. II civ., sentenza 19 marzo 2014, issued with respect to the mediation delegated by the Judge).

advantages); it is then necessary to schedule a preliminary planning meeting referred to above before one of the mediation bodies registered with the Ministry of Justice;<sup>6</sup> at the meeting, the parties may reach an agreement, may decide to continue with the mediation or, in case an agreement is not reached, may terminate the mediation process and start a claim before a civil court; at this point, the mediator<sup>7</sup> will draft a record showing the outcome of the mediation which, if an agreement is reached, constitutes a title enforceable by the parties.

As to the behavior of the parties, it is important to note that failure to take part in the mediation process without a legitimate reason may be taken into consideration by the Judge in terms of evidence. Furthermore, when the mediation is mandatory, the Judge condemns the party who failed to participate without a legitimate reason to pay a penalty amounting to the tax ordinarily due for starting a legal action before civil courts.

Another novelty introduced by *Decreto del Fare* deserves attention, namely the changes made to the mediation delegated by the Court. The original version of Legislative Decree no. 28 of 2010 provided that, during a trial (even before a second instance Court), the Judge could invite the parties to start a mediation process. This provision has remained untouched by the abovementioned decision of the Constitutional Court no. 272 of 6 December 2012. After the entry into force of the *Decreto del Fare*, the law now states that the Judge (including a second instance Court) may provide for the implementation of a mediation process.

It is clear that, today, the mediation delegated by the Judge is a special form of mandatory mediation, the source of which lies in the Judge's decision; while before the *Decreto del Fare* the *ex officio* mediation was a form of voluntary mediation.

In case the Judge provides for the implementation of a mediation process, such implementation becomes a condition for the admissibility of the legal action and, therefore, if the mediation is not started the Judge shall declare the claim inadmissible.

It is interesting to note that the mediation delegated by the Judge is not limited to the disputes arising in the fields specified above for which mediation is always a condition for the admissibility of the claim brought by the plaintiff.

With specific reference to the mediation delegated by the Judge, the relation between mediation and the attempt at conciliation under sect. 185-*bis* (deepened in detail in the following paragraphs) should be addressed. Case law has recently adopted two 'practical' trends: some Courts have first made to the parties a settlement or conciliation proposal and adjourned the case to another hearing, reserving to

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<sup>6</sup> The mediation bodies are the private and public entities before which the mediation process takes place.

<sup>7</sup> Of course the mediator, who is the natural person who, individually or collectively, conducts the mediation process, has no power to take decisions or proposals that are binding on the parties. As said above, lawyers are mediators at law.

delegate the mediation during such hearing;<sup>8</sup> other Courts, instead, make to the parties a settlement or conciliation proposal and directly provide for the mediation process, adjourning the case to another hearing to hear the parties.<sup>9</sup>

Mediation has been reintroduced by the *Decreto del Fare* with the express intention to intervene on the length of Italian civil proceedings, as to make the Italian legal system more competitive and efficient.<sup>10</sup>

The new mediation entered into force on 20 September 2013 and it will remain mandatory to start a mediation process as admissibility condition for a lawsuit before civil courts for an experimental period of 4 years, subject to the monitoring of the Ministry of Justice on the concrete results on mediation recorded in the field.<sup>11</sup>

## **2. The Attempts at Conciliation Contained in the CPC. Distinctive Elements**

The judicial attempt at conciliation under sect. 185-*bis* certainly is not a novelty for our system of civil procedure: it was in fact already provided for in the original version of our CPC as a possibility for the Judge; it was subsequently made mandatory, first in the proceedings for labour disputes and then, by means of Law no. 353 of 26 November 1990, in the ordinary proceedings on the merits; it was later repealed with the entry into force of Law no. 80 of 14 May 2005, recurred on 1 March 2006, which implemented Law Decree no. 35 of 14 March 2005 and which, in this respect, amended the pre-existing wording of sect. 183 CPC.

However, the 2006 reform did not completely remove the judicial attempt at conciliation from the code for disputes subject to ordinary proceedings on the merits, as such attempt was introduced by the same 2006 reform in sect. 185 CPC,

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<sup>8</sup> Trib. Milano, sez. IX civ., ordinanza 27 novembre 2013; Trib. Roma, sez. XIII, ordinanza 23 settembre 2013.

<sup>9</sup> Trib. Milano, sez. impresa (B), ordinanza 11 novembre 2013.

<sup>10</sup> Many are the incentives provided by the law maker in order to make mediation a useful form of ADR. If mediation is unsuccessful and the civil proceedings started thereafter terminates with a decision which corresponds fully to the content of the proposal made within the mediation process, the prevailing party who has refused such proposal cannot request payment of the legal expenses by the other party and, instead, is condemned to pay such party's legal expenses, in addition to the tax due and the mediator's compensation.

Conversely, if the Court's decision does not fully match the mediation proposal, the Judge may, at the occurrence of serious and exceptional reasons, preclude the prevailing party who has refused such proposal from requesting to the losing party the payment of the mediator's compensation.

The law also sets for fiscal benefits: all documents relating to mediation process are exempt from stamp duty and any other charge or tax. Furthermore, the agreement reached within the mediation process is exempt from registration tax up to the value of € 50.000. Finally, if the mediation is successful, the parties will benefit from a tax credit up to € 500 for the payment of the indemnities due to the mediation body; instead, if the mediation is unsuccessful, the tax credit is up to € 250.

<sup>11</sup> Please note that the mediation delegated by the Judge is not subject to this 'expiry' term introduced by sect. 5, para. 1-*bis*, Law no. 98 of 2013.

allowing the Judge to examine freely the parties on its own motion and obligated the Judge to examine them to provoke their conciliation 'upon request jointly filed by the parties.'

Another rule similar, at least *prima facie*, to sect. 185-*bis* can be found in the proceedings for labour disputes: para. 1 of sect. 420, as amended by the so-called 'Collegato Lavoro' (Law no. 183 of 4 November 2010), provides that, at the hearing scheduled for discussing the case, the Judge 'attempts the conciliation of the dispute and makes to the parties a settlement proposal.' Also this rule was modified by *Decreto del Fare* which, by introducing the wording 'or conciliation' allows the Labour Judge to make to the parties not only a settlement but also a conciliation proposal.

A similar provision was contained in the proceedings for corporate lawsuits, namely in sect. 16, para. 2, of Legislative Decree no. 5 of 17 January 2003 which established the possibility for the Panel of Judges, when the order setting the hearing also provided for the personal appearance of the parties, to examine them freely and to proceed 'if the nature of the case permits it, with an attempt at conciliation, possibly by proposing options of equitable resolution of the dispute.'

Apart from the latter provision, repealed by Law no. 69/2009, the wording of sect. 185-*bis* differs from the wording of the pre-existing sect. 183 CPC, of sect. 185, as well as of sect. 420, because it is provided that – at least in light of the literal wording of the rule – the proposal is the natural prosecution of the free examination of the parties, as act 'reserved' to the party or its representative pursuant to sect. 77 CPC and aimed at clarifying the dispute as to the fact of the case. Actually, the Judge, in the proposal under sect. 185-*bis* cannot be completely independent from the parties and their prior free examination. The proposal must 'in any case arise orally, once having heard the parties, and not as an abstract authoritarian measure, *ex abrupto* dropped from above, without a prior contact between the parties and the judicial authority.'<sup>12</sup> Also the timing is relevant compared to the other provision (especially to the proceedings for labour disputes) and precisely the moment within which the proposal must be made.

### **3. The Attempt at Conciliation under sect. 185 of the CPC and the Proposal under sect. 185-*bis* of the CPC**

It seems clear that the interpretation of sect. 185-*bis* CPC can be done either considering the rule, albeit independently, as a sort of 'continuation' of the provisions of sect. 185 CPC or, instead, as detached from it.

However, this second possible interpretation – certainly justified in the light of the wording of the provision at issue – seems almost to empty the new legislative

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<sup>12</sup> Claudio Consolo, *Per una vocazione e dirittura ad un tempo tecnica e politica della organizzazione meno stentata della giustizia civile o comunque non penale*, 45(3/4) *Rassegna forense* (2012) [hereinafter Consolo, *Per una vocazione*].

provision. Providing for the making by the Judge of a settlement or conciliation proposal without putting him in the position to assess the knowledge of the parties actually means, to a certain extent, nullifying the same rationale of the institution at issue. Moreover, from such an autonomous interpretation of the rule it would necessarily follow that the Judge is required to make a settlement or conciliation proposal to the party's legal counsels, and not directly to the parties. It is evident that this would not only make the proposal certainly less effective, since it is precisely the authority and position of the Judge to have a major influence on the parties for the purposes of a conciliation resolution of the dispute, but could also determine the futility of the proposal itself.

Indeed, on the one hand, certainly the power of attorney does not include the substantial representation of the parties, because, of course, those acts that imply the – direct or direct – ‘free disposability’ of the substantive right (such as the settlement and the conciliation of the dispute under sects. 183 and 185 of the CPC, the deferral and referral of the derisory oath, the confession, the request to the Judge to decide *ex aequo et bono* rather than according to law) do not fall within the powers of the legal counsels, without the express conferment to that effect.<sup>13</sup> In fact, only before the *Giudice di Pace* (the judge in minor dispute cases), the power of attorney includes the power for settlement and conciliation of the dispute (sect. 317, para. 2, of the CPC), while, before the *Tribunale*, should a party grant to its legal counsel the power to settle or conciliate the dispute under sect. 185 or, in labour disputes, under sect. 420, para. 3, must expressly include such power in the – special or general – power of attorney, which may be certified by the legal counsel pursuant to sect. 83 CPC.

However, in this perspective, one should imagine that the counsel, to whom the Judge addresses the proposal, is a mere *nuntius*, but this would inevitably significantly dilute the meaning of the judicial proposal.

#### 4. Timeframe of the Proposal

With regard the timeframe within which the Court may make a proposal pursuant to sect. 185-*bis*, it seems appropriate to make some clarifications. Indeed, as already mentioned, the rule introduced by the *Decreto del Fare* provides for two different time limits for the making of the judicial proposal: ‘at the first hearing,’ *i.e.* the hearing set for the first appearance of the parties and the discussion of the case pursuant to sect. 183 CPC, or ‘until the conclusion of the evidence-taking phase of the proceedings.’

It seems unlikely that the Judge will make use of the possibility to make a settlement or conciliation proposal at a hearing (that governed by sect. 183 CPC) in which unlike what happens in the proceedings for labour disputes – where the introductory briefs of the parties must be essentially complete in view of its strict

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<sup>13</sup> Claudio Consolo, 2 Spiegazioni di diritto processuale civile 206 (2<sup>nd</sup> ed., Giappichelli 2012).

foreclosures – the Judge will not be sufficiently aware of the evidence so as to make a proposal capable of being examined and accepted by the parties. In the ordinary proceedings on the merits, in fact, the last evidence foreclosure occurs with the brief referred to in sect. 183, para. 6, no. 3, CPC.

In light of the above, it must be held that, by providing for the possibility of making a proposal at the first hearing, the lawmaker intended to refer only to those disputes in which it is believed that no evidence activity is needed, and in any case confided in a thorough reading of the parties' briefs by the Judge *in limine litis*, which to tell the truth is not a general practice and perhaps is even incompatible with the workload of at least some judicial offices.

The wording 'until the conclusion of the evidence-taking phase of the proceedings,' combined with sect. 188 CPC, leads to the unequivocal conclusion that the proposal can be made up to the specification of the parties' conclusions.

### **5. The Rule and the Purpose of Procedural Economy**

In this respect, the provision at issue opens the way to a significant criticism.

If it is believed that the proposal can be made by the Judge up to the specification of the parties' conclusions, such provision collides with the principle of procedural economy that seems to be the intention of the lawmaker, the real rationale of the entire reform which has, for this purpose, reintroduced mandatory mediation. However, to a certain extent, the proposed settlement or conciliation made at a time so close to the pronouncement on the merits of the dispute seems to be a sort of anticipation of the judicial authority's decision.

### **6. The Proposal: Discretion or Obligation?**

From the wording of the version of sect. 185-*bis* CPC prior to the conversion into law of the Law Decree and from the wording 'the Judge . . . must submit to the parties a settlement or conciliation proposal' it seemed that the proposal at issue was an obligation (and not a possibility) for the judicial authority,<sup>14</sup> while such character is admitted in unavailable disputes (*i.e.* in those cases in which the legal representative of the party does not have the power to settle or conciliate the dispute, without a specific authorization: *e.g.*, the trustee in bankruptcy, or the director-legal representative in the appeal of a shareholders' resolution).<sup>15</sup>

However, beyond these cases, the lawmaker's intentions regarding the nature of the settlement or conciliation proposal already appeared unclear and, in fact, the

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<sup>14</sup> Claudio Consolo & Elena Marinucci, *Impugnazione per nullità di delibera assembleare e arbitrato*, 2013 *Rivista di diritto civile* 217.

<sup>15</sup> Consolo, *Per una vocazione*, *supra* n. 12.



Report to the proposed conversion of the Decree states that 'the judge may of course decide not to make a settlement or conciliation proposal should the impossibility to settle the dispute be patent.' In this respect, the wording following the conversion into law of Law Decree no. 69 of 2013 seems to be, *prima facie*, less ambiguous than that provided in the original version. As a matter of fact, the provision at issue, which is in force since 21 August 2013, no longer contains the wording 'must' and, therefore, the lawmaker seems to have, in this respect, 'detuned' the judicial attempt at conciliation, transforming it from a real obligation (albeit 'empty' as there was effective sanction for its violation) to a mere discretion.

The new text of sect. 185-*bis* provides that the Judge shall submit the proposal to the parties 'when possible, having regard to the nature of the case, the value of the dispute and the existence of issues of law of easy and prompt resolution.'

The process for the conversion into law of the *Decreto del Fare* has led to radical amendments which have revolutionized the wording and the objectives that the rule was intended to pursue, including the promotion of forms of judgment alternative to ordinary proceedings on the merits aimed at the settlement of the dispute. Indeed, the judicial settlement or conciliation proposal, which was established as an obligation, becomes discretionary.

From the wording of the newly introduced sect. 185-*bis*, which was confirmed by the introduction of the words 'when possible,' it can be inferred that the clear intent of the lawmaker is to make the judicial settlement and conciliation proposal as optional, and certainly no longer mandatory. Furthermore, the possibility of using this form of ADR is connected to a series of parameters identified by the law in the nature of the case, the value of the dispute and, finally, the existence of issues of law of easy and prompt resolution. The reference to the nature of the case was already provided for before the 2005 reform in the judicial attempt at conciliation under sect. 183 CPC as well as, prior to its repeal, in that contained in proceedings for corporate disputes. The other parameters that should guide the Judge in order to assess the suitability for making a settlement or conciliation proposal are entirely new, as they have never been used before in relation to the other attempts at conciliation provided for by the CPC or special laws. It is indisputable that these criteria expand the discretion of the judge on that regard.

## **7. Sanctions and the Changes Made by the Converting Law**

Section 185-*bis* CPC as originally phrased by the *Decreto del Fare* before its conversion into law stated that the unjustified refusal to the settlement or conciliation proposal made by the Judge constituted a conduct which the Judge may consider when deciding the case, regardless of the possible coincidence between the proposal and the final decision of the Judge.

The wording used by the lawmaker of the *Decreto del Fare* is identical to that of sect. 420 CPC as amended by the *Collegato Lavoro*. Nevertheless, the lawmaker, in

the conversion into law of the *Decreto del Fare*, probably prompted by the criticism in relation to the ambiguous wording of sect. 185-*bis* on 'sanctions,' considered appropriate to delete the part of the rule which provided for the consequences of an unjustified refusal to accept the judicial proposal. Thus, today, the parties, even if they do not adhere to the settlement or conciliation proposal made by the Judge at the first hearing or until the conclusion of the evidence-taking phase of the proceedings, cannot be, for that reason, sanctioned.

Indeed, one might even think that, in light of the new wording of the recently introduced sect. 185-*bis*, the parties may reject the judicial proposal in the absence of a justified reason, without incurring, even in this case, any consequences and, moreover, not even being the Court entitled to consider such conduct when deciding the case, as it seemed possible by virtue of the wording of the rule prior to its recent amendment by the converting law.

However, the most reasonable interpretation seems to be that supported by certain scholars<sup>16</sup> with reference to sanctions arising from the unjustified refusal to the attempt at conciliation pursuant to sect. 420 CPC: the sanction should be found in sect. 91, para. 1, period 2, as amended by sect. 45 of Law no. 69/2009, according to which if the Judge grants the claim in an amount not higher than the one object of the conciliation proposal, if any, he condemns the party who, without any justified reason, refused to accept the proposal, to pay the expenses of the proceedings accrued after the proposal was made, without prejudice to sect. 92, para. 2, of the CPC.

This solution, initially proposed by scholars, was subsequently supported by the case-law on the occasion of one of the first rulings concerning the new section 185-*bis* CPC. The Tribunale of Nocera Inferiore,<sup>17</sup> indeed, showing the coordination of the new rule with sect. 91, said that the refusal to the conciliation proposal should be adequately justified and motivated in order to avoid that the parties incur in the application of any sanctions under sects. 91 and 92 CPC. In addition to this sanction, the Judge may also apply sect. 96, para. 3, introduced by the 2009 reform, according to which 'in any event' when the Judge decides on the expenses pursuant to sect. 91 he, also on its own motion, may condemn the losing party to pay in favour of the opposing party an amount of money determined *ex aequo et bono* as compensation for damages. The main purpose of these provisions is to avoid forms of abuse, and to actually strengthen the conciliation role of the court (and certainly not to discourage the use of the judicial protection of a right). The new wording of the rule, which leaves to the Court any assessment on the making of settlement or conciliation

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<sup>16</sup> Luigi de Angelis, *Collegato lavoro e diritto processuale: considerazioni di primo momento* (WP C.S.D.L.E. 'Massimo D'Antona:IT – 111/2010), available at <[http://www.astrid-online.it/--il-lavoro/Studi-ric/deangelis\\_n111-2010it.pdf](http://www.astrid-online.it/--il-lavoro/Studi-ric/deangelis_n111-2010it.pdf)> (accessed Aug. 3, 2014); Marco de Cristofaro, *Il nuovo regime delle alternative alla giurisdizione statale (adr) nel contenzioso del lavoro: conciliazione facoltativa ed arbitrato liberalizzato*, 2011 *Il lavoro nella giurisprudenza* 57.

<sup>17</sup> Trib. Nocera, sez. I civ., ordinanza 27 agosto 2013.

proposal, is therefore devoid of any express sanction in the event of unjustified refusal. Certainly, however, the lack of coordination between the provision at issue and sect. 91, para. 1, CPC is likely to dilute the purposes of the rule, namely litigation deflationary purposes and the provision of a soft procedural measure which will probably be rarely used in practice.

## 8. The Settlement and the Conciliation

The wording of the provision at issue is ambiguous also in other respects. It is well known that the institutions referred to in sect. 185-*bis*, namely conciliation and settlement, are significantly different. Conciliation is a dispute resolution manner which may have a very varied content (a transaction, a waiver, an acknowledgment or any other legal act, contained in an official report showing the joint intention of the parties); the settlement, instead, has a strictly contractual connotation, as is also confirmed by sect. 1965 of the Italian Civil Code which defines the settlement as a contract whereby the parties, making mutual concessions, put an end to a dispute existing between them or prevent a dispute that may arise between them. *A fortiori*, the two proposals that may be made by the Judge (it is believed, one alternative to the other) necessarily differ from each other: while the settlement proposal arises from the *petita* of parties and reaches a negotiated solution involving reciprocal concessions; the conciliation proposal aims to achieving a solution acceptable to both parties which, one might say, is independent from the respective claims and pursue the satisfaction of the interests at stake.

Therefore, it appears that the lawmaker of the *Decreto del Fare* has increased, even in this respect, the confusion relating to the possibility of finding an 'alternative' solution to the proceedings for the resolution of the dispute.

Moreover, some scholars believe that the words 'settlement' and 'conciliation' are essentially synonymous, at least in all cases where, also in the context of a conciliation, there are mutual concessions; and this, it is noted, will almost always occur, at least as regards legal expenses and possibly for the sole purpose of reducing them.<sup>18</sup>

## 9. The Proposal under sect. 185-*bis* and the Role of the Judge

Finally, the proposal for resolving the dispute made by the Judge in a stage phase close to the decision of the case certainly poses some difficulties of interpretation with reference to the principles of fairness and impartiality of the judicial authority;<sup>19</sup>

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<sup>18</sup> Claudio Consolo, *Per una vocazione*, *supra* n. 12.

<sup>19</sup> Lotario Dittrich, *La precognizione del giudice e le incompatibilità nel processo civile*, 57(4) *Rivista di diritto processuale* 1152 ss. (2002) [hereinafter Dittrich, *La precognizione del giudice*].

the Judge, with the proposal at issue, anticipates his decision on the dispute which is unlikely to change once the evidence-taking phase is concluded.<sup>20</sup>

Precisely in order to prevent the problems related to the impartiality of the judge making a settlement or conciliation proposal during the proceedings, the new wording of sect. 185-*bis* expressly provides that 'the conciliation proposal is not grounds for the Judge's recusal or abstention.' This provision was not contained in the original version of sect. 185-*bis* but was inserted by the lawmaker only later during the conversion into law of the *Decreto del Fare* and was clearly intended to prevent the parties from filing a motion for recusal based only on the fact that the Judge has made a settlement or conciliation proposal.

Scholars have argued that the rationale of the Judge's abstention under sect. 51 CPC is to avoid that the Judge feel psychologically bound to the view he has previously expressed.<sup>21</sup>

Other scholars, instead, do not see any difficulty in that the Judge make conciliation proposals during the proceedings.<sup>22</sup>

Certain scholars have pointed out that the Judge, as institutionally deputed to resolve disputes by the *res judicata* (i.e. with an adjudicative measure aimed at definitively assigning to one party or the other a certain right), must express its opinion on the dispute only in the deciding stage of the proceeding.

Moreover, according to other scholars the Judge 'has a mixed nature: that of a mediator of the conciliation agreement, containing a settlement regulation of the dispute, and that of authority holding the power to decide the dispute in the event of failure of the conciliation.'<sup>23</sup> The same scholar considers as unfounded the 'widespread ideological resistance and the cultural backwardness which guard against the risk of an undue anticipation of the Judge's decision, relevant as reason

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<sup>20</sup> Luciana Breggia, *Il tentativo di conciliazione e l'imparzialità del giudice*, 40(2) *Giurisprudenza di merito* 571 (2008); Luigi P. Comoglio, *La durata ragionevole del processo e le forme alternative di tutela*, 62(3) *Rivista di diritto processuale* 591 (2007); Francesca Cuomo Ulloa, *La Conciliazione: modelli di composizione dei conflitti* (CEDAM 2008); Giuliano Scarselli, *Le modifiche in tema di spese*, 134(5) *Il Foro Italiano* 261 (2009).

<sup>21</sup> Lotario Dittrich, *L'incompatibilità per il giudice derivante dalla precedente cognizione della controversia*, 42(1) *Rivista di diritto processuale* 51 (1987). Actually, the opinion of this scholar has been expressed with reference to the judicial authority within the appeals system; *contra*: Claudio Consolo, *Una benvenuta interpretazione costituzionalmente orientata dell'art. 51 n. 4 (in relazione all'art. 28 St. lav.) ed i suoi limiti per i casi futuri*, 17(1) *Corriere giuridico* 56 (2000); Giuliano Scarselli, *Terzietà del giudice e processo civile*, 121(1) *Il Foro Italiano* 3616 (1996).

<sup>22</sup> Ilaria Pagni, *La riforma del processo civile: la dialettica tra giudice e le parti (e i loro difensori) nel nuovo processo di primo grado*, 26(10) *Corriere giuridico* 1320, 1320 (2009); Domenico Potetti, *Novità della l. n. 69 del 2009 in tema di spese di causa e responsabilità aggravata*, 42(4) *Giurisprudenza di merito* 938 (2010); Domenico Dalfino, *Mediazione, conciliazione e rapporti con il processo*, 135(5) *Il Foro Italiano* 105 (2010).

<sup>23</sup> Antonio Scarpa, *Ruolo del giudice e potere delle parti nell'udienza di trattazione*, 2010(10) *Il Corriere del merito* 905.

for abstention, whenever the same Judge, in managing the attempt at conciliation, or even in a reasoned decision on anticipatory motions or on the admissibility and relevance of evidence, express his pre-assessments on the outcome of the dispute' and believes that the above is rather 'an expression of the principle of cooperation between the Court and the parties, and as such can never jeopardize the outcome of the judgment.'

According to a certain interpretation, moreover, the mere making of the proposal should result in the incompatibility with the decision-making function of the Court: the Judge should refrain from deciding (or would risk being recused by the party) when 'he has advised or has provided legal services' or when there are 'serious reasons of convenience that advises the court to abstain.' Indeed, the position of absolute impartiality of the Judge from the positions of the parties should be a structural element of the Judge's activity and, therefore, it must be 'avoided that the dispute be decided by someone who has already formed an opinion about it.'<sup>24</sup> Furthermore, the rationale of the discipline concerning the abstention obligation of the Judge 'would be the Judge's pride who would hardly desist from a resolution of the dispute given in advance, in concrete terms.'<sup>25</sup>

When the law provided for a mandatory attempt at conciliation, the case law<sup>26</sup> held that a motion for recusal under sect. 51 CPC against a Judge who had made a conciliation proposal to the parties should be rejected. In the precise reasons for the abovementioned rejection, it reads:

[I]n general it is up to the Judge to submit conciliation proposals to the parties, in accordance with sections 183 and 185. The attempt at conciliation, that the Judge must mandatorily make at the first hearing and may renew at any other stage of the proceedings, is nothing more than a possible amicable settlement of the case. It follows that the conciliation activity of the Court, far from being considered as an undue expression of the decision on the facts of the case, is a necessary exercise of powers established by the law. It should then be noted that the conciliation proposal made by the Judge does not contain an assessment of the facts of the case that may qualify as an anticipation of the judgment, and certainly cannot affect the decision of the cause.

The new provision, providing that the making of the conciliation proposal cannot by itself count as a reason for abstention or recusal of the Judge, creates a series of

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<sup>24</sup> Dittrich, *La precognizione del giudice*, *supra* n. 19, at 1145.

<sup>25</sup> Roberto Romboli, *Voce Astensione e ricusazione del giudice (dir. proc. civ.)*, in 3 *Enciclopedia giuridica Treccani* (Istituto Poligrafico e Zecca dello Stato 1980); Luigi Mattirotolo, 1 *Trattato di diritto giudiziario civile italiano* 950 (5<sup>th</sup> Fratelli Bocca 1902–1906).

<sup>26</sup> Trib. Verbania, *ordinanza* 10 aprile 2004.

problems and concerns where it admits that the law may 'impose' what 'does not constitute' grounds for abstention and, especially, for recusal by the parties. In other words, the sections of the CPC dealing with the reasons for abstention and recusal (namely sects. 51–54) identify the cases in which the Judge is obliged to abstain or in which the parties may request the Judge's recusal. Section 185-*bis* instead identifies *a contrario* what does not constitute grounds for abstention or recusal. In this case, it therefore appears that the lawmaker has, more or less deliberately, set up a limit to the right of the parties to request the recusal of the judge designated, a right that, as already said, is a fundamental guarantee of the principle of impartiality. Moreover, should it be the same Judge who has made a settlement or conciliation proposal, which is considered as an anticipation of the decision, to assess the opportunity to abstain rather than proceed with the decision of the dispute, one wonders how to reconcile the obligation to abstain pursuant to sect. 51 CPC with the 'non-abstention' referred to in sect. 185-*bis* CPC. It seems correct to assume, in this case, that the legislation intended to ensure the principle of impartiality of the judicial body should prevail so that when 'serious reasons of convenience exist, the Judge may ask to the head of the judicial office the authorization to abstain from deciding the case.'

Another problematic aspect resulting from the introduction of the wording 'the conciliation proposal cannot constitute grounds for the Judge's recusal or abstention' in sect. 185-*bis* CPC – on which, however, it does not seem appropriate to dwell excessively – is the fact that the lawmaker has only mentioned the conciliation proposal as reason of 'non-abstention' and 'non-objection,' without mentioning a settlement proposed settlement, referred to instead in the first part of the same rule. It is the writer's opinion that there is no reason to exclude the application of the principle at issue also to the settlement proposal and, therefore, in this case it is possible to state that the lawmaker *minus dixit quam voluit* and thus interpret it by analogy.

## 10. Final Remarks

In conclusion, if, on the one hand, the new provision is yet another attempt by the lawmaker to reform the civil proceedings with litigation deflationary purposes and thus improve the condition of the Italian civil justice, on the other hand such a provision – certainly less problematic than the reenactment of mandatory mediation, which, as said, was also implemented by the *Decreto del Fare*, and in respect to which it is likely that the Constitutional Court will intervene soon and it is now possible to witness a strong reaction from the legal profession<sup>27</sup> – gives rise to

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<sup>27</sup> Similar reactions have taken place with respect to the first mediation regulations of 2010. Layers have opposed such form of ADR from the beginning, even with strikes and demonstrations. Iconic is the abstention from hearings in civil trials from 16 to 22 March 2011, declared by the Unitary body of Italian layers (*Organismo Unitario della Avvocatura Italiana*).

a series of difficulties of interpretation which inevitably affect the judicial practice. It is precisely for these reasons that the writer believes that the reconciliation led by the Judge, in the absence of a true cultural change, cannot be a real alternative means of dispute resolution and will hardly allow the achievement of the objectives that the lawmaker has intended to accomplish through its introduction.

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Criticism involved, on the one hand, the whole institution of mediation which has become the subject of a widespread rejection, and, on the other hand, many individual aspects of the regulation itself. For example, the requirements for the enrolment to the registry of mediation have been criticized: such requirements are believed not to guarantee the professionalism, independence and organizational quality of the mediation bodies.

Eventually, this opposition has been heard, to some extent, by the lawmaker of 2013, as some of the changes made to mediation, compared to the set of rules contained in Legislative Decree no. 28 of 2010, have been made in that regard.

In any case, as said, criticism remains vivid with respect to mediation even after its reenactment. As a matter of fact, the National Association of Italian Lawyers (*ANAI – associazione nazionale avvocati italiani*) have highlighted that vices of unconstitutionality are still present in the mediation regulation, even after the *Decreto del Fare*. For example, private mediation bodies are believed to be scarcely independent and in lack of transparency; the more so considering that most of them have been authorized by means of 'silence-consent' mechanisms. Furthermore, the new rules on mediation state that the length of the mediation process is not relevant for the calculation of the length of civil proceedings for the assessment of the reasonable length of trials; however, the mediation inevitably (even though for a short period of time) broads the times of civil justice.

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