THREE ESSAYS ON ADR EFFICIENCY

by

SVITLANA ZADOROZHNA

A dissertation submitted in candidacy for the degree of Doctor of Philosophy

IEL- International Programme in Comparative Analysis of Institutions, Economics and Law

Collegio Carlo Alberto, Università degli Studi di Torino

November 2019

ACKNOWLEDGMENTS

I am grateful to everyone who contributed to this PhD project. Without your support and guidance this project would not have been possible.

First of all, I would like to thank my supervisor. To Professor Giovanni B. Ramello, thank you for your support and encouragement during the whole process of PhD preparation. Thank you for putting your trust in me, giving me the freedom to find my own research pass, but bringing me back on track when it was necessary. To Alessandro Melcarne, thank you for your assistance at the important stages of the project, especially the empirical part of it.

I would also like to thank representatives of four Chambers of Commerce of Italy (Torino, Firenze, Crotone and Pisa cities) who provided information on mediation. I especially appreciate assistance provided by Maria Elena De Bonis from Turin Chamber of Commerce, who made everything she could to assist with data gathering. Without your assistance this project would never have been completed.

Special thank you to Judy Yueh Ling Song, who supported me especially after coming back from maternity and helped with friendly proofread of the papers.

I also acknowledge the three years of financial support of Turin University scholarship.

Any errors are my own.

Personally, I would like to thank my husband, my parents and my sister for help and understanding throughout the research. I am especially grateful to my daughter, who despite everything allowed me to stay with her not 24 hours during the day.

TABLE OF CONTENTS

LIST OF FIGURES

LIST OF TABLES

INTRODUCTION

This dissertation is composed of three stand-alone chapters examining different aspects of Alternative Dispute Resolution (ADR) efficiency.

The first chapter provides for general definition, taxonomy and features of ADR and its types, *i.e.*, negotiation, mediation and arbitration. The paper provides an overview of economic studies of ADR and its efficiency/inefficiency. The proponents of ADR demonstrate that ADR could facilitate access to justice in case it is used appropriately. However, it is very important to be attentive when dealing with ADR. Even the same ADR technique can be applied in many different ways, depending on particular circumstances. Based on specific ADR features, each ADR type could have its own upsides and downsides; therefore, it is often not appropriate to make any general statements about the overall efficiency of ADR. In addition, the legal treatment of the ADR processes varies in different jurisdictions, and the impact of the ADR process will depend on local laws. Finally, one case can differ significantly from another, and subjecting the same case to distinct processes is not feasible.

We have provided general taxonomy of ADR and have analysed the main features considered to be advantages of ADR and demonstrated that they are not absolute. Although ADR was designed to promote them, nowadays the reality is not as it was intended. Albeit, there are proponents of ADR, economic and legal specialists emphasise that ADR could have reverse effect.

The second and the third chapters are empirical studies.

The second paper examines the influence of advocates' participation on mediation outcome in Italy. The paper examines whether advocates' involvement increases for the parties to the mediation the probability to enter into mediation agreement. Italy is chosen for the study, *inter alia*, because of its legislation requirement for the party to mediate with the mandatory involvement of the professional lawyer (advocate) in some categories of civil cases.

The goal of this study was to estimate empirically the impact of advocates' participation on the mediation outcome in Italy. Thus, the analysis was focused on the evaluation of explanatory variables in terms of the probability for the parties to come to the agreement and close the dispute. The advocates' participation on the behalf of the plaintiff and the defendant were considered separately.

This paper provided evidence on the puzzling role of advocates in mediation. It demonstrates that in the case of advocates' presence, the outcome of mediation depends mainly on the role and goals of the advocate within the process of dispute resolution. More precisely, the advocate's participation on behalf of plaintiff influences negatively on making the mediation agreement. And this result was expected due to the completely different nature of mediation and role of advocate. The puzzling part relates to the defendant's advocate, whose involvement in to mediation promotes mediation and has a positive influence on reaching a mediation agreement. The results are stable using both probit and logit models for data analysing.

The third paper is dedicated to study of mediation duration. Mediation duration cannot be considered as the perfect proxy for the success of mediation, but it for sure could be used in order to demonstrate the parties' willingness to mediate, *i.e.*, their attitude and keen to look for a case solution. The goal of the study was to estimate empirically the impact of different variables on the longevity of mediation cases in Italy. Thus, the analysis was focused on the evaluation of explanatory variables in terms of the probability for the parties to come to the agreement and close the dispute. Empirical analysis was done using the survival analysis, in particular, Cox and Weibull models.

Our empirical results confirmed that the parties' characteristics mainly define the mediation duration. In particular, our analysis confirmed that the number of participants and their assistance by the advocate influence the mediation duration. The result is a little bit puzzling if we consider that the importance has the number of plaintiffs, not defendants. At that, only the defendant's advocate participation influences mediation duration. Hence, we have the importance of a qualitative characteristic of one party and a quantitative characteristic of another one.

The result is important as it confirms the second chapter related to the advocates' role in mediation. Therefore, we consider that mediation duration could be used as a

proxy of the intention to mediate, and indirectly as the success of mediation, our result that presence of the advocate on behalf of the defendant determines the mediation duration, indirectly confirms also our previous result, *i.e.*, advocate's presence on behalf of defendant leads to mediation success.

The foundation of our empirical chapters is an original dataset, which was compiled specially for this project using data requested and obtained from four Chambers of Commerce of Italy for the period of 2011—2017.

The findings of this study may have important policy implications and could be taken into consideration by Italian specialists in mediation area. The results demonstrate that introduction of the rule about mandatory participation of the advocate in the mediation procedure does not improve mediation *per se*. Even more, as the plaintiff's advocate participation leads to less possibility for parties to reach a mediation agreement.

Chapter 1. ADR efficiency

1. Introduction

We cannot imagine contemporary world without social and economic development. No development is possible without cooperation, and no cooperation is possible without disputes. Any contract is a potential dispute. Therefore, we need a workable system that would ensure dispute resolution without destruction of the cooperation and slowing down the development. An independent and effective justice system provides a safeguard for human rights, but also for a number of other aspects of life in society that are crucial to the well-being of individuals and organisations, such as health, work, industrial relations, social security, family relations, civil rights, environmental rights, consumer rights, property rights, the enforcement of contracts (CEPEJ, 2013). It was well indicated by Kofi Annan in 2004[1], that "without a credible machinery to enforce the law and resolve disputes, people resorted to violence and illegal means" (Annan, 2004). "The centrality of a strong justice mechanism lies in its essential contribution to fostering economic stability and growth, and to enabling all manner of disputes to be resolved within a structured and orderly framework" (UNODC, 2011); therefore, it is crucial to analyse the justice system functionality and define the factors that could strength or weaken it.

[1] Secretary-General of the United Nations that period.

As a state of "crisis" of the judicial system is in place in large and small, rich and poor regions, regardless of their level of political and legal development (Fix-Fierro, 2003), within this paper we attempt to define whether ADR[2] could satisfy the demand in efficient dispute resolution that would promote cooperation and economic development. We will try to answer the question, whether ADR is efficient and what makes it efficient and/or precludes it from being as such.

ADR is considered to improve access to justice being efficient dispute resolution procedure [Rass-Masson and Rouas (Milieu), 2017]. Sometimes the roots of ADR are traced back to the Pound Conference[3] (Parisi, 2017) where the professor's Frank Sander speech (Sander, 1976) has been identified by many as marking the birth of the modern ADR phenomenon as he identified pros and cons of different types of dispute resolution that further were summarised as the concept of the "multi-door courthouse"[4] (Sternlight, 2000a). According to this concept, litigation was considered as one option among many including conciliation, mediation, arbitration, and ombudspeople (Kessler and Finkelstein, 1998). Based on the concept in question, disputes should be efficiently addressed through the mechanism best suited for the parties and the issues involved, the parties should be able to choose from the menu of available alternatives (Sander, 1976).

However, the history of ADR is traced from the ancient world (Barrett and Barrett, 2004; Sanchez, 1996). Even if we talk about the USA, it should be recorded the 29th annual meeting of ABA in 1906[5] where Roscoe Pound delivered the keynote address (Pound, 1964). According to Roscoe Pound, the courts should be administered more effectively. It was noted that the adversary system often turned litigation into a game, irritating all the process participants (parties, jurors, and witnesses) and giving the public the "false notion of the purpose and end of law"[6] that promoted the growth of the ADR movement. Also he complained about "the manner in which the courts emphasised the procedural form over the substance" that resulted in "[u]ncertainty,

[2] ADR will be defined further as there is no unique definition.
[3] Formally known as the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, took place on April 7-9, 1976 in Minneapolis, Minn.
[4] The name was given by American Bar Association (ABA), as the Professor Sander called it "comprehensive justice center"(Hernandez Crespo and Sander, 2008).
[5] Further called the first "Pound Conference", which was held in St. Paul, Minnesota on 29 August 1906.
[6] Pound called it "sporting theory of justice".

delay and expense, and above all, the injustice of deciding cases upon points of practice." (Ibid.). This speech provoked decades of reform in American system of dispute resolution (Traum and Farkas, 2017).

This paper will not be dedicated to the history of ADR; even it is a very interesting topic deserving a separate study. Further we will analyse ADR, its types and features, possibility to have it efficient, without going deep back in ages.

In order to achieve the goal of this study, *i.e.*, to analyse the possible dimensions of ADR efficiency emphasising particularly the efficiency of mediation, this paper proceeds as follows. The next section provides for the definition, types and features of ADR. It gives an overview of the different types of ADR and defines the main features that unite and/or distinguish its different types. Section 3 provides for the meaning of efficiency for ADR. Conclusions follow in section 4.

2. ADR: definitions, types and features

2.1. ADR Definition

As a first step, we need to define the terms used in this paper as there is no unique definition of ADR either in scientific literature, or among practicing specialists. ADR is used in many different ways. ADR is also called as *"informal" justice* (when parties choose the process and outcomes, where their consent is important) versus *"formal" justice* (with clear rules of the procedure and "rule of law" application, evidence, but limited remedies). In addition, *"semi-formal*" (hybrid and combined forms of) dispute resolution are defined (Menkel-Meadow, 2012).

Traditionally, ADR is defined as "*Alternative* dispute resolution". For instance, according to the New-York Court, "Alternative dispute resolution (ADR) refers to a variety of processes that help parties resolve disputes without a trial. Typical ADR processes include mediation, arbitration, neutral evaluation, and collaborative law. These processes are generally confidential, less formal, and less stressful than

traditional court proceedings" ("New York State Unified Court System site," n.d.). Similarly, in the European Union legislation, "Alternative dispute resolution (ADR) offers a simple, fast and low-cost out-of-court solution to disputes between consumers and traders" (Preamble of Directive on consumer ADR, 2013). *Alternative* is used most commonly as an alternative to litigation, embracing a variety of practices including: mediation, negotiation, facilitation, arbitration, consensus decision making, and restorative practices.

However, recently more and more scientists consider "A" (in ADR) as *Appropriate*. The "Appropriate" is used to emphasise the aim of being collaborative, respectful, and considerate of everyone's view (Menkel-Meadow, 2001). It includes any method of dispute resolution that goes from Negotiation to Litigation and depends on the parties' control and influence on the process they are party to and refers to the possibility to use the most appropriate method fitting the individual circumstances of the parties. The choice of the methods depends on the intentions of the parties, both in terms of what outcomes the parties seek, and how they want to deal with their fellow disputants (Menkel-Meadow, 2016). More rarely "A" is used as *Adaptive*, when emphasising the creative elements of ADR; or *Amicable* when highlighting the non-confrontation character of ADR (Mirimanoff and Pons, 2014).

Still, the interpretation of the *Alternative* dispute resolution is not unique: in a wider sense, ADR is regarded as any process that is not classical court process, and this includes class action (Cappelletti, 1993; Menkel-Meadow, 2009), combined tecniques like arbitration-mediation, pure mediation, techniques that take part outside the court, but within its shadow (*e.g.*, court-attached mediation), etc. (Palmer and Roberts, 2005). In a strict meaning, ADR is totally separated from courts and does not include adversarial methods, *i.e.*, arbitration (Green Paper, 2002).

For this paper purposes, ADR is regarded as *Alternative* dispute resolution and it includes a number of methods that allow resolving disputes without referring to the state court. Within the paper main attention will be paid to such methods as negotiation, mediation and arbitration.

2.2. ADR Taxonomy

Based on the third party presence/participation the processes include:

a) the "primary" process, which consists of individual action: self-help, avoidance (Menkel-Meadow, 2015);

b) bargaining between the parties without involvement of others – negotiation;

c) processes with involvement of the third party include mediation, arbitration and ombudsman ["a designated neutral who is appointed or employed by an organisation to facilitate the informal resolution of concerns of employees, managers, students and, sometimes, external clients of the organization."(Wesley, 2004)];

d) involvement of technology (internet platform) – ODR (online dispute resolution). It primarily involves negotiation, mediation or arbitration, or a combination of all three ("Userguide - Online Dispute Resolution," n.d.).

The above processes are "pure" ADR processes. The combination of the elements of the "pure" ADR processes creates "hybrid"/"secondary" process, *e.g.*,

a) med-arb is a combination of mediation with arbitration, *i.e.*, facilitated negotiation that is followed by the binding decision (Honeyman, 2016);

b) minitrial is a structured settlement process where the rules of evidence are not applied, except rules governing privileged communications. Minitrials as most ADR processes are fully confidential, and not recorded ("Minitrial," n.d.; Sherowski, 1996);

c) summary jury/judge trials is an ADR tool in which parties summarise their case before a real jury, which returns an advisory verdict, which helps to decide a negotiation strategy (to settle or to continue to a real trial) (see example in Hatfield, 1991; Sherowski, 1996);

d) early neutral evolution is a submitting of the case to a neutral evaluator (usually lawyer or other expert) through a confidential "evaluation session". The neutral evaluator considers each side's position and renders an evaluation of the case (Allison, n.d.).

Within this paper we will deal with "pure" ADR processes and leave combined ones for future.

Based on the extent to which ADR is voluntary and consensual or mandated/mandatory, all ADR processes could be divided into voluntary and mandatory (that includes both cases of legislative prejudiciary requirement and court referral). According to the ideology of ADR, these processes should be voluntary and all agreements should be reached consensually. However, as they are used to "manage"/reduce the judiciary caseloads, ADR processes are used as means of diverting cases to other fora. As such even mediation is often "mandated"[7], although it is usually participation in, not substantive agreement, that is required (Menkel-Meadow, 2012).

Based on the result of the procedure, ADR processes can be binding or nonbinding. Arbitration is generally binding, unless parties agree otherwise. Mediation and negotiation are generally nonbinding; however, mediation becomes binding if the law states it and /or there is a respective agreement between parties (*Mediazione civile*, 2010b; "United Nations Convention on International Settlement Agreements Resulting from Mediation," 2019).

ADR processes are often subject to different requirements depending on whether they are used in private settings (by contract, in employment or other organisational settings) or in public arenas such as courts. Court related or "court-annexed" ADR programs and class actions are subject to greater legal regulation, including selection, training, and credentialing of the arbitrators or mediators, ethics, confidentiality, and conflicts of interest rules, as well as providing for greater immunity from legal liability (Menkel-Meadow, 2012).

ADR processes are also differentiated from each other by the degree of control the third party has over both, the procedure (the rules of proceedings), and the substance (decision, advice, or facilitation), and the formality of the proceeding (held in private or public settings, with or without formal rules of evidence, informal separate meetings, and with or without participation of more than the principal disputants). Despite

[7] For instance, Italian Mediation Law provides for a mandatory (sometimes called also opt-out) mediation in a number of cases.

mediation involves the use of a third party facilitator, a mediator usually has no coercive power and the process in which he engages also differs from adjudication. “The central quality of mediation is the capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another” (Sander, 1976).

Based on the authorities of the third party within the process ADR processes include:

a) adjudication is an involuntary, adversarial process, where arguments are presented to prove one side right and one side wrong, resulting in win-lose outcomes. In the Adjudicative processes a third-party makes a binding decision for the parties. Adjudicative approaches include arbitration and court adjudication (Morris, 2002);

b) non-Adjudicative processes include other ADR methods that do not foresee making binding decision by the neutral third party. Non-adjudicative methods should result in win-win solutions for the parties to the dispute.

In addition, we should indicate the types of mediation based on the role of the third person as the characteristics of the procedure could define the outcome.

a) Facilitative mediation is the most common type of mediation. The third party (mediator) listens to both parties and makes informed suggestions based on his/her professional knowledge (Elwell, 2015). The mediator structures a process to assist the parties to reach a mutually acceptable solution. The mediator discovers the parties’ positions; searches for interests underneath the positions taken by parties; and assists them in finding and analysing options for resolution. Within facilitative mediation, the mediator does not make recommendations to the parties, he/she does not give his/her own advice and/or opinion as to the outcome of the case, does not predict the outcome of the court case. The mediator is in charge of the process, while the parties are in charge of the outcome (Zumeta, n.d.).

b) Evaluative mediation is a type of mediation in which the mediator makes recommendations and suggestions and expresses opinions. Instead of focusing primarily on the underlying interests of the parties involved, evaluative mediator helps parties to assess the legal merits of their arguments and to make fairness determinations. Evaluative mediation is most often used in court-mandated mediation, and evaluative mediators are often the attorneys who have legal expertise in the area of the dispute (Shonk, 2019). Again, the mediator hears the concerns of each party and gives legal advice as to how those concerns would likely stand up in court or the best way to represent them in court to work to everyone's advantage (Elwell, 2015).

c) Transformative mediation is a type of mediation in which the mediator focuses on empowering parties to resolve their conflict and encouraging them to recognise each other's needs and interests. Transformative mediation aims to transform the parties and their relationship through the process of acquiring the skills they need to make constructive change (Shonk, 2019).

Although there is no research focused on assessment of the impact of mediation on the culture of disputing, 30 family law lawyers were interviewed in 2004. They were asked about characteristics they preferred in family law mediators. Mediators with substantive knowledge and litigation experience in family law were preferred. The majority preferred efficient and solution-focused mediation. At least one third of the lawyers preferred mediators who were willing to provide opinions or to be "directive", although majority of them were not acquainted with notion of facilitative or evaluative mediation (Morris, 2013).

2.3. ADR Features

ADR features are the characteristics that force parties to choose it as an alternative to a trial. ADR features mostly are defined as its advantages. Within this paper, among other things, we will define whether such features are real or imaginal.

There are two strands of ADR advantages (Menkel-Meadow, 1997):

a) quantitative chain that is also called case reducing or case management side of ADR, including ensuring speedy, less costly and thus more efficient case proceeding;

b) qualitative side of ADR that emphasises that both dispute processes and their outcomes can be improved via referring to alternative to full-scale trial. As for the process, ADR provides for more party participation and control over the proceedings. ADR allows a greater possibility of more than the particular "dispute" resolving, but a reconciliation (McThenia and Shaffer, 1985) and better communication between disputing parties. As for the outcomes, ADR promises the possibility of more Pareto optimal solutions[8], in which bipolar results are avoided without coming to unnecessary compromises. ADR allows exploring the parties' underlying interests in order to meet them. In addition, ADR allows the adoption of more complex and flexible solutions that are tailored to the parties' needs or situation. ADR could provide better outcomes than traditional adjudication, as litigation can only deal with the resolution of disputed facts of past events, while ADR is focused in the resolutions that are oriented on future.

Thus, the following are generally considered to be the ADR advantages over a lawsuit:

a) ADR can be faster. A dispute often can be resolved in a matter of months, even weeks, through ADR, while a lawsuit can take years. However, it should be noted that since the mid-1980s the concerns about the perceived increase in time and costs of international arbitration have been raised, starting the time that preceded the period of exponential growth of international arbitration (Nigmatullina, 2016);

b) ADR can save money. Court costs, attorney's fees, and expert fees can be saved. However, International Arbitration Surveys for years 2006, 2013 and 2015 demonstrated that the expense and the length of time to resolve disputes were the two most commonly cited disadvantages of international arbitration. In

[8] A solution is called Pareto optimal, if none of the objective functions can be improved without degrading some of the other objective values.

particular, 2015 Survey revealed that cost was seen as arbitration's worst feature, followed by, among others, lack of speed ("2015_International_Arbitration_Survey: Improvements and Innovations in International Arbitration," 2015; "Corporate Choices in International Arbitration Industry perspectives," 2013; "International arbitration survey: Corporate attitudes and practices," 2006);

c) ADR ensures more participation of the parties to the dispute allowing them to tell their side of the story than in court and may have more control over the outcome;

d) ADR is a flexible procedure that is defined by the parties by the arbitration agreement (arbitration clause) or agreement to mediate. Attention should be taken to the rules defined by the Arbitration/Mediation Institutions in case the latters are defined as responsible for the dispute resolution;

e) ADR allows the parties to be cooperative, thus the parties might work not against each other, but together with the assistance of the neutral in order to resolve the dispute and agree to a remedy that makes sense to them.

Together with the advantages, some disadvantages should be indicated.

a) ADR is not suitable for every dispute. Every country defines the criteria of disputes subject to ADR;

b) binding ADR generally does not allow reviewing the decision (*i.e.*, arbitral award) for legal errors. Being a disadvantage, such a rule also allows faster process as no additional processes, appeals follow;

c) to be effective, ADR parties should possess all the information required, ADR provides less opportunity to find out about the other side's case;

d) as it was indicated above, ADR could be costly and not fast, especially this relates arbitration;

e) in case of failure of ADR, the latter becomes additional part of dispute resolution pyramid, increasing the parties' cost and time for dispute resolution.

3. ADR Efficiency

First of all, the efficiency used for this paper should be defined. As for judicial efficiency most often two approaches are used: 1) the clearance rate, *i.e.*, the ability of the system to reply to the demand of justice; 2) the technical efficiency score, characterised by the additional feature of considering at the same time both the demand of justice and the productive optimisation (Ippoliti et al., 2015). In other words, judicial system is efficient in case it allows resolving as many cases as possible utilising less possible time and costs. As for ADR, not only amount of cases resolved should be taken into account, but first of all, amount of disputes closed and/or prevented.

Thus, we should look at ADR efficiency as not only the values-reducing cost and delay procedure, but as technique used to serve many additional purposes, *e.g.*, to try to repair a party's damaged sense of self, to restore/ begin building relationships between parties, or to give healthy vent to feelings that otherwise might go unacknowledged or undervalued (Brazil, 2006).

Parties to the (potential) dispute agree to apply to ADR if they assume that ADR would increase their welfare by allowing a reduction in the transaction costs of resolution of their dispute and/or an improvement in the quality of the outcome. In order to define the increase in the welfare, it is required to identify, to what compare. Mostly, arbitration is compared with litigation and mediation is compared with unfacilitated negotiation (Mnookin, 1998). However, it is possible to compare based on common and/ or distinguishing features or dimensions.

In such ADR efficiency could be studied in two levels, dimensions: (1) internal efficiency that involves analysis within one ADR type, and (2) social efficiency that includes comparable evaluation.

3.1. Internal Efficiency

Internal efficiency defines the conditions when the procedure itself is efficient without comparing it with other types of ADR or with litigation.

Starting from negotiation (Mnookin, 2003), we understand that a rational decision obviously requires a consideration of costs, those associated with the process of negotiation, regardless of whether there is a settlement. In any negotiation, irrespective whether related to a deal making or dispute resolution, parties bear transaction costs as they invest time, money, manpower, and other resources.

Negotiation transaction costs can include the following elements: attention and energy of valuable employees, professionals and experts. There is no precise or predictable amount of transaction costs as their amount depends on numerous factors, including type and duration of negotiation, necessary logistics and auxiliary involvements. Sometimes transaction costs may make negotiation an economically inefficient process, for instance it would be true for any type of business that performs a large volume of transactions with a large number of parties. Such transaction costs include also the disclosure of information, which may be exploited by the counterpart in future actions, regardless of whether an agreement is achieved in that instance (Mnookin, 2003).

Another example of internal efficiency is given by a study of mediation, where mediators can create value in negotiations between rational parties (Ayres and Brown, 1994).

Mediators are mainly involved in disputes resolving by "caucusing" privately with the parties. Such private meetings "caucusing" is a characteristic of the mediation, as such private meetings take place neither in arbitration, nor in negotiation. These "caucusing" meetings allow to mediator to collect private information and to distribute it further. Thus, mediators create value by controlling the flows of information between parties and as such control the mediation outcome. They can mitigate adverse selection and moral hazard. Adverse selection is caused by hidden information that distorts the terms of a contract. Moral hazard is caused by hidden conduct. Thus, adverse selection problems involve hidden pre-contractual information; moral hazard problems involve hidden post-contractual conduct. They both are the result of the parties' ability to hide information about themselves or their conduct, and both lead to inefficiency. Adverse selection case is inefficient negotiation when some information about their valuation

prior to agreement is hidden. Moral hazard is a problem of coordination as it arises when parties take hidden actions that reduce the joint gains. Parties' inability to observe each other's conduct leads to inefficiency in performance coordination.

Mediators can reduce adverse selection in three ways: "(1) by committing parties to break off negotiations when private representations to a mediator indicate that there are no gains from trade; (2) by committing parties to equally divide the gains from trade; and (3) by committing to send noisy translations of information disclosed during private caucuses" (Ayres and Brown, 1994).

The mediator can overcome both psychological barriers and economic inefficiency in negotiation. He/she facilitates settlement and improves negotiation outcome by getting the right people to the negotiation table and by exposing the host of underlying interests (Barendrecht and de Vries, 2005).

One more analysis is provided for arbitration, *inter alia*, distinguishing *ex ante* and *ex post* arbitration agreements. Steven Shavell explores the incentives of adding ADR to the litigation process. Under ADR he understands arbitration, and in addition to comparative analysis as for litigation, provides "internal" comparison as indicated (Shavell, 1995).

Ex ante arbitration (ADR) is where the parties voluntarily agree to use ADR before a dispute has arisen (*e.g.*, via including arbitration clause to the main agreement). *Ex post* ADR agreement is being done after a dispute has already arisen. The key question is whether or not ADR affect the pre-dispute behaviour that raises joint value for the parties. *Ex ante* agreements made by "informed" or "acknowledgeable" parties increase the expected utility of the parties and raise social welfare. *Ex ante* agreements should ordinarily be enforced because of the potential advantages of ADR, and the "frequent inability" to negotiate them after the dispute arises. As soon as *ex post* ADR does not have incentive effects on the parties' pre-trial behaviour, there is "no apparent basis" for the state to impose involuntary *ex post* "non-binding" ADR. Although it is possible that *ex post* ADR may be a cheap substitute for a trial, Shavell emphasises that ADR may increase the frequency of suits and encourage people to engage in ADR who otherwise would have settled. In case ADR does not have positive outcome, it simply

adds another layer to the dispute resolution process without promoting settlement(Shavell, 1995).

Ex post ADR agreement does not provide any additional benefit to those achievable via *ex ante* ADR arrangements. Moreover, *ex ante* ADR agreements promote contingency and additional advantages not available in case of *ex post* ADR agreement, *i.e.*, *ex ante* ADR agreements motivate parties' pre-dispute conduct, thereby increasing the joint benefits of the parties. Such pre-dispute conduct includes the following. The parties' primary behaviour is affected, so they are stimulated to meet the contractual obligations and comply with the substantive law looking for a more accurate outcome from the main agreement containing ADR clause. Parties are induced to meet at least standard performance requirements especially in case they aware that the chosen arbitrator is the specialist in their contract's area (Shavell, 1995). *Ex ante* ADR clause influences positively the parties' procedural behaviour as well. They are more due diligent in gathering and preservation of evidencing information throughout the cooperation. Further, *ex ante* agreements allow the parties to overcome strategic barriers in order to reach mutually beneficial ADR agreement (Mnookin, 1998) and also enlarges the zone of possible agreements. At last, *ex ante* ADR agreements can promote refraining from the disputes where possible.

3.2 Social Efficiency

We would like to start with the most flexible, free process, *e.g.*, negotiation and will move forward for more complex and regulated procedures up to litigation.

Negotiation does not involve any third party, either with adjudicative (like arbitrator) or facilitative (like mediator) power. Negotiation is always voluntary, nobody can be forced to negotiate, and as a result only the parties are responsible for the process and the result of negotiation. Parties start negotiation only if they are interested in achieving mutually acceptable solution; therefore, such solution mostly suits their needs and interests and is done as a contract enforced under the law. Negotiations are typically private, so there is less risk of disclosure of confidential information and as such the

cost of its protection. Hence, negotiation should ensure spending less time and money, unless parties face a number of barriers they fail to overcome. Among such barriers could be indicated the following (Mnookin, 1993):

a) strategic barriers – party who implements strategic behaviour and tries to have a better result for itself provokes inefficient general outcome;

b) the "principal/agent" problem – due to fact that in most cases the negotiating parties (principals) are represented by a lawyer, employee, or officer (agent), whose behaviour fails to serve the interests of the principal itself;

c) cognitive barrier that relates to how the human mind processes information, especially in evaluating risks and uncertainty;

d) "reactive devaluation" that relates to the fact that bargaining is an interactive social process in which each party is constantly drawing inferences about the intentions, motives, and good faith of the other.

These barriers could be overcome by assistance of the mediator. As such, mediation can be more efficient than negotiation due to the presence of the neutral person who helps to overcome the barriers, while the parties exercise the effective control over the substantial contours of the dispute resolution outcome and the procedural framework. In addition, a mediator may help the parties reach better agreements with lower transaction costs that might often be Pareto-superior to the one the parties might have reached on their own (Mnookin, 1998). Thus, mediation lowers the risks and transaction costs associated with resolving the dispute even more dramatically.

Mediation is an informal process and mediator has no authority to impose a resolution on the parties. His/her goal is to facilitate negotiation and help the parties themselves to reach a mutually acceptable settlement of their own dispute. Due to its informal and flexible character mediation is typically takes less time and requires fewer costs than arbitration. At that each mediator applies his/her own rules (agreed with and between the parties) that allow resolving dispute in the manner best fitting the parties' needs and interests.

While the negotiation results in making a civil agreement that can be broken again, mediation in many countries may finish in making a decision enforceable by the law[9]. A mediation agreement is rather flexible: it may simply reflect the net expected value of what is likely to happen in court or can be shaped to meet the needs and interests of the parties by making trades that are unrelated to the legal disputes. As long as mediation is voluntary and the mediation agreement is mutually acceptable to the parties, there is no need to have additional means of its enforcement. There is typically no process of review. Depending on each country's legislation, mediation agreement can be enforceable as a contract or as a judicial decision (sometimes upon undertaken some additional actions).

The parties may fail to settle, because they have divergent expectations about what will happen at trial (Landes, 1971). Having convergent expectations about the outcome in court, the theory suggests that disputes would be settled in order to avoid further litigation, so transaction costs are to be saved. The mediator who possesses and coordinates the flows of information may facilitate the exchange of essential information and improve communications between the parties, thus improving the parties' understanding of each other's positions. The mediator does it faster or at lower cost than the parties would require doing it on their own.

As already noted, negotiations are compared with mediation while arbitration with a trial. However, it is possible to compare mediation with arbitration. The main differences are: more flexible procedure of the mediation and the nature of procedure outcome, arbitration reward is taken by the arbitrator and is generally always enforceable, while mediation agreement is taken by the parties themselves and is enforceable in some jurisdictions, while is not such in others. As we have already indicated, arbitration becomes more and more bureaucratic, thus less time and cost efficient ("2015_International_Arbitration_Survey: Improvements and Innovations in International Arbitration," 2015; "Corporate Choices in International Arbitration Industry perspectives," 2013; "International arbitration survey: Corporate attitudes and practices," 2006). Therefore, mediation generally remains more efficient in comparison with the arbitration.

[9] *E.g.,* Mediation agreement is enforceable under the Law on Mediation of Italy.

Moving further we compare arbitration and litigation. While arbitration is still often named as being faster and cheaper alternative to litigation, this is no longer clearly true as we have emphasised already. Nowadays we see an increasing convergence between arbitration and litigation. This is explained both by the involvement of lawyers experienced in litigation into arbitral proceedings and because the parties use confrontation tactics they are expected to use in court while referring to arbitration. As a result, we cannot talk anymore about economy of cost and time in case of contemporary arbitration, but we still can find a procedural flexibility and the parties' autonomy within the arbitration procedure that provides the possibility somewhere "faster and/or cheaper procedure" to those parties who wish one (Cole et al., 2014).

If parties agree so, a dispute that might otherwise go to court becomes subject to binding arbitration. Arbitration is always created by the contract. In contrast to mediation, arbitration does not exist without the parties' particular arbitration agreement. It means that arbitration is always voluntary; it cannot be stated by the legislation as the prejudication requirement. Both, *ex ante* and *ex post* arbitration agreements set out the procedural rules. Contracting parties choose to resolve all or a subset of their disputes through arbitration in order to minimise the costs of their relationship. Specifically, arbitration is chosen in case it provides the greatest difference between deterrence benefits and dispute resolution costs for every type of dispute [if we define the deterrence benefits (or governance benefits) as avoided harms net of avoidance costs]. For contracting parties, the harms avoided through superior governance generally can be classified as losses due to breach of either explicit or implicit contract terms (Hylton and Drahozal, 2003).

There are three fundamental differences that define the arbitration efficiency in comparison with litigation.

a) The parties choose an arbitrator, whereas a judge is typically assigned. The arbitrator is typically chosen with expertise in the subject matter of the dispute, not necessary with a legal background, whereas a judge is typically a legal generalist who is knowledgeable about legal procedures, but may have no relevant experience and background relevant to the dispute. As a result,

arbitrator in most cases should not be additionally "educated", and it saves time as the judge very often needs time to "delve" into the subject area. In most European jurisdictions the parties are free to decide whom to choose as an arbitrator, with no particular legal or formal requirements being imposed by the *lex arbitri*. For instance, arbitrator does not need to be a lawyer, or meet the requirements for election to a judicial post at national level. However, not many non-lawyers are appointed as arbitrators unless the arbitrator should possess specific technical or commercial knowledge (Cole et al., 2014). In addition, the arbitrator's experience makes his/her decision more informed and predictable. As a result, arbitration may have both lower transaction costs and higher quality results than litigation.

b) Next advantage of arbitration relates to the fact that arbitration may proceed more quickly because of its comparative procedural informality. In common law system[10], the conventional litigation pre-trial discovery stage (taking pre-trial depositions and answering interrogatories) creates a significant cost as it can be very time-consuming and make up a very high proportion of the total transaction costs of litigation. Due to limitation or even elimination of the discovery stage, these costs are being eliminated. This feature could be considered both as advantage and disadvantage as economy of time results in possible failure to obtain the important unfavourable information.

c) The finality of the arbitral award is the third difference that results in time and costs economy as this feature eliminates (limits much) the possibility of appeal. As previous feature, this one also could be regarded as advantage and disadvantage because it takes away the safeguard of the losing party[11]. However, after the tribunal has taken its decision, any party can bring an action before a State court in the seat of the arbitration to set the award aside (*i.e.*, declare it invalid and unenforceable). The list of the reasons allowing declaring

[10] Common law (also known as judicial precedent or judge-made law) is the body of law derived from judicial decisions of courts and similar tribunals. The common law is that body of law and juristic theory which was originated, developed, formulated and is administered in England, and has obtained among most of the states and peoples of Anglo-Saxon stock ("Black's Law Dictionary - Free Online Legal Dictionary," n.d.).

[11] Arbitration does not provide for a win-win solution as mediation and negotiation does. This is one more feature that distinguishes mediation and negotiation from adjudicative arbitration.

the award invalid or unenforceable is rather limited, it includes extreme cases, like fraud and corruption of arbitrators (Cole et al., 2014).

The mainstream approach to ADR is explained well by Steven Shavell (Shavell, 1995) and Keith Hylton (Hylton, 2000) who advocate using ADR in dispute resolution. This approach is based on the "rational choice theory", the assumption that the parties take rational decision to be a part of ADR and to apply this procedure whenever the latter mutually benefits them. Informed parties have a mutual incentive to enter into a waiver agreement when and only when litigation is wealth reducing, in the sense that the deterrence benefits (avoided harms net of avoidance costs) from litigation are less than expected litigation costs. Under similar conditions, they will enter into arbitration agreements when the margin between deterrence benefits and dispute resolution costs is larger under the arbitral regime. These results suggest a presumption in favour of enforcing these agreements, especially where parties are informed (Hylton, 2000).

ADR agreements made by acknowledgeable parties raise their well-being, the agreements raise social welfare; therefore, they should be enforced by the legal system. At the same time, there is no general need to subsidise or otherwise aid ADR agreements by the state (Shavell, 1995).

As we see from the above, both authors emphasise that parties are "informed" or "acknowledgeable" (even if they generally concede the possibility of information asymmetries); the parties must have perfect information about the case. Therefore, the problem can arise with the information asymmetry, as the parties generally do not possess all the relevant information; moreover, the portions of the information they have are often significantly different[12].

Another important note is that it is assumed that ADR is lowering the cost (and risk) of resolving disputes (Shavell, 1995); however, as we have mentioned above lowering the cost is not always the case for ADR, especially if ADR is not resulted in settlement or any party further refuses to fulfil the decision (agreement) voluntary; the

[12] Here we do not talk about discussed above disclosure requirements under common law system, but mostly about general "before case" situation and civil law process requirements where the parties are not obliged to share ALL the information among them.

procedure becomes rather expensive. Shavell admits this problem of possible adding layer to the dispute resolution and subsequently increasing its cost, but does not go in-depth in the analysis (Shavell, 1995).

At the same time, there are also critics of mandatory ADR (Budnitz, 2004; Higginbotham, 2008; Landsman, 2005 and others; Sternlight, 2005, 2000b)[13]. In particular, consumer arbitration is being much criticised by Jean Sternlight (Brunet et al., 2006), who believes that, as a practical reality, consumers cannot bargain over arbitration clauses, they have a little choice and prone to accept the terms of the standard form contracts used by businesses. According to these critics, enforcement of waiver agreements deprives consumers of their access to court on an involuntary and unknowing basis.

Behavioural economists give their own explanations to the existence of ADR clauses in the agreements while criticising the rational choice theory. The main critique of the mandatory ADR is that the "weaker" party (*i.e.*, consumer) may not know about the ADR clause incorporated into the agreement. In reality, the ADR clause (as any other agreement clause) is known to both parties to the agreement. And exactly strategic ignorance can explain the "lack of knowledge" as people opt to read only the clauses they are really interested in when, for instance, purchasing goods or entering into other agreement: object of the agreement (*e.g.*, goods purchased), price and other terms of that type. Not many people indeed are prone to read liability, *force-majeure* and/or ADR/litigation clause. Strategic ignorance could also be explained by the fact that *ex ante* no party has precise information and prediction about the best forum for dispute resolution. At the same time, in most cases ADR does not exclude the possibility to go to the court at the end of the story, but makes the way longer.

Professor Korobkin when analysing agreements' terms from the bounded rationality point of view determines whether the contract term of the standard contract is salient or non-salient to a significant number of buyers. A term is salient if it is evaluated, compared, and implicitly priced as part of the purchase decision. Meanwhile

[13] As it was mentioned above arbitration cannot be mandatory, and authors here talk precisely about arbitration; what the authors refer about is mandatory clause in the template agreements where the parties are not expected to make any amendments.

a term is non-salient when the market check on seller overreaching is absent. Accordingly, legislatures should mandate efficient non-salient terms *ex ante*, and courts should police them *ex post* for inefficiency (Black, 2011).

As most consumer agreements are standard ones, customers could believe that the ADR clause could not be alerted. The *status quo* bias explains why the parties do not consider the implications of the clause. They just prefer to live with the existing agreement that seems to work than to crash into negotiations, as such bearing the transaction costs related to, and have something they are not sure about.

Thus, rational ignorance, over-optimism and *status quo* bias give explanations why standard agreements are often not being negotiated, in particular, the ADR clause of standard agreements remains intact.

In addition to the possibility to ensure economy of the costs and risks of trial, the ADR proceedings, mainly negotiation and mediation rather than arbitration also offer the parties unique benefit: referring to ADR allows the parties to ensure confidentiality (regarding the dispute itself and its outcome), expanding the zone of possible agreements, allows parties to extract reputational benefits, and ensure future due conduct (Mnookin, 1998).

One more efficiency story to be considered is whether ADR promotes social value and increase in social welfare. The normative support for ADR relates mainly the considerations of efficiency, underlying the enforcement of contracts (Paulson, 2013). The efficiency attributed to ADR agreements is premised upon the increase in the welfare of the parties, as it can be understood from their behaviour and entering into the ADR agreement. In most cases the common interest of the parties does not contradict the social interests, *i.e.*, parties are interested in economy of time and costs, while there is a public interest in cost-efficient conflict resolution in society. However, sometimes averting trials is considered as not fully optimal solution, in particular, because the trial costs are not covered fully by the parties (as it is mainly the case for ADR, arbitration/mediation), but are subsidised partially via cost externalising (Kaplow and Shavell, 1999).

In addition, due to confidentially character of ADR, there is no internalisation of the social benefits that should be created by conducting trials. This feature is more important for common law system where courts supply a special public good – legal precedent (Landes and Posner, 1979). As a result, a number of cases referred to ADR are excluded from a judiciary, which results in decrease in possible precedents creation, *i.e.,* decrease in legal norms supply (Fiss, 1984). In the aftermath, parties choosing ADR, especially arbitration, use already created precedents without investing into creation new norms as such is not expected from parties to the agreement and arbitrator.

However, it should be emphasised once again that the described issue relates common law countries as civil law countries do not utilise precedents, at least officially. Judges and arbitrators can study the practice of previous court/arbitration decisions, but they ground their decisions on the written norms, contained in laws and bylaws.

4. Conclusions

By this paper we have demonstrated that ADR could facilitate access to justice in case it is used appropriately. However, it is very important to be attentive when dealing with ADR. Even the same ADR technique can be applied in many different ways, depending on particular circumstances. ADR may comprise small centres in a single location or a network of large centres around the country. It can involve different types of disputes: such as between businesses, between employees and management, between businesses and creditors (insolvency, restructuring), between investors and the state (investment treaty arbitration), or between businesses and the government (tax disputes). All these differences make ADR a rich field, but they also make estimation of its efficiency more complicated.

Based on specific ADR features, each ADR type could have its own upsides and downsides; therefore, it is often not appropriate to make any general statements about the overall efficiency of ADR. In addition, the legal treatment of the ADR processes varies in different jurisdictions, and the impact of the ADR process will depend on local

laws. Finally, one case can differ significantly from another, and subjecting the same case to distinct processes is not feasible.

The paper provides general taxonomy of ADR and analysis of the main features considered to be advantages of ADR and demonstrated that they are not absolute. Although ADR was designed to promote them, nowadays the reality is not as it was intended.

Albeit, there are proponents of ADR, economic and legal specialists emphasise that ADR could have reverse effect, for instance in some cases of consumer arbitration (so called “compulsory arbitration”). In such a case, ADR might increase time and cost of the dispute resolution, or even prevent resolving the dispute.

References:

2005 Stanford Law Review Symposium: the civil trial : adaptation and alternatives., 2005. . Board of Trustees of the Leland Stanford University, Stanford, Calif.

2010 International Arbitration Survey: Choices in International Arbitration, 2010.

2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, 2012.

2015_International_Arbitration_Survey: Improvements and Innovations in International Arbitration, 2015.

2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration, 2018.

A Strategic Framework for Access to Justice in the Federal Civil Justice System, 2009.

Access to Civil & Family Justice http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf: A Roadmap for Change Action Committee on Access to Justice in Civil and Family Matters, 2013.

Access to Justice: UNDP Practice Note, 2004.

ADDRESSES DELIVERED AT THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE, West Group. ed, 1976. . 70 F.R.D. 79.

Alkon, C., 2011. Lost in Translation: Can Exporting ADR Harm Rule of Law Development. Journal of Dispute Resolution 2011, 165–187.

Allison, J., n.d. Research Guides: Alternative Dispute Resolution Research: Early Neutral Evaluation (ENE) [WWW Document]. URL https://guides.library.harvard.edu/c.php?g=310591&p=2078483 (accessed 9.30.19).

Alschuler, A.W., 1986. Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases. Harvard Law Review 99, 1808–1859. https://doi.org/10.2307/1341209

Amsler, L.B., 2017. DISPUTE SYSTEM DESIGN AND THE GLOBAL POUND CONFERENCE. CARDOZO J. OF CONFLICT RESOLUTION 18, 621–635.

Amsler, L.B., Nabatchi, T., Senger, J.M., Jackman, M.S., 2009. Dispute Resolution and the Vanishing Trial: Comparing Federal Government Litigation and ADR Outcomes. Ohio State Journal on Dispute Resolution 24, 1–38.

Annan, K., 2004. Access to Justice.

Ashenfelter, O.C., Bloom, D.E., Dahl, G.B., 2013. Lawyers as Agents of the Devil in a Prisoner's Dilemma Game: Evidence from Long Run Play. Journal of Empirical Legal Studies 10, 399–423.

Auerbach, J.S., 1984. Justice without law?: [Resolving disputes without lawyers], 1st paperback ed. ed. Oxford University Press, Oxford.

Avraham, R., Hubbard, W.H.J., 2018. The Spectrum of Procedural Flexibility (SSRN Scholarly Paper No. ID 3140585). Social Science Research Network, Rochester, NY.

Ayres, I., Brown, J., 1994. Economic Rationales for Mediation. VIRGINIA LAW REVIEW 80, 323–402.

Barendrecht, M., de Vries, B.R., 2005. FITTING THE FORUM TO THE FUSS WITH STICKY DEFAULTS: FAILURE IN THE MARKET FOR DISPUTE RESOLUTION SERVICES? CARDOZO J. OF CONFLICT RESOLUTION 7,

83–118.
Barrett, J.T., Barrett, J.P., 2004. A history of alternative dispute resolution: the story of a political, cultural, and social movement, 1st ed. ed. Jossey-Bass, San Francisco, CA.
Becker, G.S., Landes, W.M., 1974. Essays in the economics of crime and punishment, Human behavior and social institutions. National Bureau of Economic Research : distributed by Columbia University Press, New York.
Benson, B.L., 1999. To Arbitrate or To Litigate: That Is the Question. European Journal of Law and Economics 8, 91–151.
Bielen, S., Grajzl, P., Marneffe, W., 2016. Understanding the Time to Court Case Resolution: A Competing Risks Analysis Using Belgian Data. SSRN Electronic Journal.
Bingham, L.B., 2002. Why Suppose? Let's Find Out:: A Public Policy Research Program on Dispute Resolution. Journal of Dispute Resolution 2002, 101–126.
Black, B., 2011. Can Behavioral Economics Inform Our Understanding of Securities Arbitration. The Tennessee Journal of Business Law 12, 107–122.
Black's Law Dictionary - Free Online Legal Dictionary [WWW Document], n.d. . The Law Dictionary. URL https://thelawdictionary.org/ (accessed 10.31.19).
Brazil, W.D., 2006. Should Court-Sponsored ADR Survive? Ohio State Journal on Dispute Resolution 21, 241–280.
Brown J., G., 1993. Blackmail as Private Justice. University of Pennsylvania Law Review 141, 1935–1974.
Brunet, E., Speidel, R.E., Sternlight, J.E., Ware, S.H., 2006. Arbitration Law in America: A Critical Assessment. Cambridge University Press, Cambridge.
Budnitz, M.E., 2004. The High Cost of Mandatory Consumer Arbitration. Law and Contemporary Problems 67, 133–166.
Bundy, S., 1992. The Policy in Favor of Settlement in an Adversary System. Hastings Law Journal 44, 1–78.
Cappelletti, M., 1993. Alternative Dispute Resolution Processes within the Framework of the World-Wide Access-to-Justice Movement. The Modern Law Review 56, 282–296.
CEPEJ, 2013. The functioning of judicial systems and the situation of the economy in the European Union Member States: COMPILED REPORT.
Clayton P. Gillette [WWW Document], n.d. URL https://www.cisg.law.pace.edu/cisg/biblio/gillette.html (accessed 10.1.19).
Cole, T., Bantekas, I., Ferretti, F., Riefa, C., Warwas, B., Ortolani, P., European Parliament, Directorate-General for Internal Policies of the Union, 2014. Legal instruments and practice of arbitration in the EU. European Parliament, Brussels.
Commission, E., 2002. Green paper on alternative dispute resolution in civil and commercial law.
Concessions and Agreements of 1677 [WWW Document], 2009. URL http://westjersey.org/ca77.htm#why1677
Condliffe, P., 2012. How do we Effectively Teach about Efficiency and ADR. Melbourne.
Cooter, R.D., Rubinfeld, D.L., 1989. Economic Analysis of Legal Disputes and Their Resolution. Journal of Economic Literature 27, 1067–1097.
Corporate Choices in International Arbitration Industry perspectives, 2013.
Creutzfeldt, C.H. and N., 2013. Implementing the EU Consumer ADR Directive, Policy

Brief. London.
Dakolias, M., 1999. Court performance around the world: A comparative perspective. The World Bank, Washington D.C.
Deason, E.E., 2013. Combinations of Mediation and Arbitration with the Same Neutral: A Framework for Judicial Review. Yearbook on Arbitration and Mediation 5, 219–249.
DIRECTIVE 2013/11/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), 2013. , in: L. Official Journal of the European Union, pp. 63–79.
Djankov, S., Porta, R.L., Lopez-de-Silanes, F., Shleifer, A., 2002. Courts: The Lex Mundi project. SSRN Electronic Journal.
Doornik, K., 2014. A rationale for mediation and its optimal use. International Review of Law and Economics 38, 1–10.
Dubois, E., Schurrer, C., Velicogna, M., n.d. PART 1 – COUNTRY FICHES PART 2 – COMPARATIVE ANALYSIS PART 3 – ANNEXES 754.
Elwell, C., 2015. Understanding The Types of Mediation. Divorce With Dignity. URL http://dwdignity.com/understanding-the-types-of-mediation/ (accessed 10.2.19).
Espinosa, R., Desrieux, C., Wan, H., 2015. Fewer courts, less justice?: Evidence from the 2008 French reform of labor courts. European Journal of Law and Economics.
Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure 45 Arizona State Law Journal 2013, n.d.
Fassin, D., Pandolfi, M., 2010. Contemporary states of emergency: the politics of military and humanitarian interventions. Distributed by the MIT Press Zone Books, Cambridge, Mass; New York.
Fisher, R., Ury, W., Patton, B., 1991. Getting to yes: negotiating agreement without giving in, 2nd ed. ed. Penguin Books, New York, N.Y.
Fiss, O., 1984. Against Settlement. The Yale Law Journal, Faculty Scholarship Series 93, 1073–1090.
Fix-Fierro, H., 2003. Courts, Justice, and Efficiency. Hart Publishing, Oxford and Portland, Oregon.
Foddai, M.A., 2012. ALLE ORIGINI DEGLI ALTERNATIVE DISPUTE RESOLUTION: IL CASO DEGLI STATI UNITI D'AMERICA. GIURETA Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente X, 407–422.
Gabuthy, Y., Lambert, E.-A., 2013. Freedom to bargain and disputes' resolution. European Journal of Law and Economics 36, 373–388.
Galanter, M., 2006. World without Trials, A. Journal of Dispute Resolution 2006, 7–28.
Galanter, M., 2004. The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts. Journal of Empirical Legal Studies 1, 459–570.
Garth, B., 1993. Front Civil Litigation to Private Justice: Legal Practice at War with the Profession and its Values. BROOK. L. Rev 59, 931–960.
Grajzl, P., Zajc, K., 2016. Litigation and the timing of settlement: Evidence from commercial disputes. European Journal of Law and Economics.
Greco, A.P., 2010. ADR and a Smile: Neocolonialism and the West's Newest Export in Africa. Pepperdine Dispute Resolution Law Journal 3, 649–676.
Hatfield, C.W., 1991. Summary Jury Trial: Who Will Speak for the Jurors, The. Journal of Dispute Resolution 1991, 151–159.

Hedeen, T., 2012. Remodeling the Multi-Door Courthouse To “Fit the Forum to the Folks”: How Screening and Preparation Will Enhance ADR. MARQUETTE LAW REVIEW 95, 941–954.

Heise, M., 2010. Why ADR Programs Aren’t More Appealing: An Empirical Perspectives. Journal of Empirical Legal Studies 7, 64–96.

Hernandez-Crespo, M.D., 2008. A Dialogue between Professors Frank Sander and Mariana Hernandez Crespo Exploring the Evolution of the Multi-Door Courthouse (Part One). SSRN Journal 5, 665–674. https://doi.org/10.2139/ssrn.1265221

Higginbotham, D.R., 2008. Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers. Duke Law Journal 58, 103–137.

Honeyman, C., 2016. Hybrid Processes [WWW Document]. Beyond Intractability. URL https://www.beyondintractability.org/essay/hybrid-roles (accessed 9.27.19).

Hylton, K.N., 2000. Agreements to Waive or to Arbitrate Legal Claims: An Economic Analysis. Supreme Court Economic Review 8, 209–263.

Hylton, K.N., Drahozal, C.R., 2003. The Economics of Litigation and Arbitration: An Application to Franchise Contracts. Journal of Legal Studies 32, 549–584.

International Arbitration: Corporate attitudes and practices, 2008.

International arbitration survey: Corporate attitudes and practices, 2006.

International Association of Procedural Law World Conference on Civil Procedure, International Association of Procedural Law (Eds.), 2012. Civil procedure in cross-cultural dialogue: Eurasia context : IAPL World Conference on Civil Procedure, 18-21 September, 2012, Moscow, Russia : conference book. Statut, Moscow.

Ippoliti, R., Melcarne, A., Ramello, G.B., 2015. Judicial efficiency and entrepreneurs’ expectations on the reliability of European legal systems. European Journal of Law and Economics 40, 75–94.

Islam, M.S., 2014. Efficiency and Effectiveness of Alternative Dispute Resolution Schemes Towards the Promotion of Access to Justice in Bangladesh. IIUC Studies 8.

Kaplow, L., Shavell, S., 1999. Economic Analysis of Law. Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series 251, 96.

Kaufmann-Kohler, G., 2007. WHEN ARBITRATORS FACILITATE SETTLEMENT: TOWARDS A TRANSNATIONAL STANDARD.

Kessler, G., Finkelstein, L.J., 1998. The Evolution of a Multi-Door Courthouse. Catholic University Law Review 37, 577–590.

Klement, A., Kapeliuk, D., 2008. Contractualizing Procedure (SSRN Scholarly Paper No. ID 1323056). Social Science Research Network, Rochester, NY.

Klerman, D.K. and L., 2015. Inside the Caucus: An Empirical Analysis of Mediation from Within. Journal of Empirical Legal Studies 12, 686–715.

KOTLER, L.S., 2016. RECONCILING CONTRACTUALIZED PROCEDURE IN LITIGATION AND ARBITRATION: A TEXTUAL AND POLICY-BASED APPROACH. EMORY LAW JOURNAL 65, 1177–1215.

Kovach, K.K., 2015. The Mediation Coma: Purposeful of Problematic. CARDOZO J. OF CONFLICT RESOLUTION 16, 755–777.

Krivis, J., n.d. Preventing the Death of Mediation [WWW Document]. URL http://firstmediation.com/preventing-the-death-of-mediation/

L, M.J., 1991. Public Values and Private Justice: A Case for Mediator Accountability. Georgetown Journal of Legal Ethics 4, 503–535.
Lagerberg - Corporate Choices in International Arbitration.pdf, n.d.
Lande, J., 2010. The Movement Toward Early Case Handling in Courts and Private Dispute Resolution (SSRN Scholarly Paper No. ID 1532515). Social Science Research Network, Rochester, NY.
Landes, W.M., 1971. An Economic Analysis of the Courts. The Journal of Law and Economics 14, 61–107. https://doi.org/10.1086/466704
Landes, W.M., Posner, R.A., 1979. Adjudication as a Private Good. The Journal of Legal Studies 8, 235–284.
Landsman, S., 2005. ADR and the Cost of Compulsion. Stanford Law Review 57, 1593–1630.
Levine, M., 1915. The Conciliation Court of Cleveland. American Judicature Society 8, 4.
Limbury, A.L., n.d. Hybrid Dispute Resolution Processes - Getting the Best while Avoiding the Worst of Both Worlds?
Love, I., 2011. Settling Out of Court: How Effective Is Alternative Dispute Resolution?
Lynch, J., 2001. ADR and Beyond: A Systems Approach to Conflict Management. Negotiation Journal 17, 207–216.
Marciano, A., Khalil, E.L., 2012. Optimization, path dependence and the law: Can judges promote efficiency? International Review of Law and Economics 32, 72–82.
Margalit, A., 2010. On compromise and rotten compromises. Princeton University Press, Princeton.
Maru, V., 2009. Access to Justice and Legal Empowerment: A Review of World Bank Practice, The Justice and Development Working Paper series.
Mattei, U., 2010. Emergency-Based Predatory Capitalism: The Rule of Law, Alternative Dispute Resolution, and Development [IN] Contemporary states of emergency: the politics of military and humanitarian interventions, in: Fassin, D., Pandolfi, M. (Eds.), Contemporary States of Emergency: The Politics of Military and Humanitarian Interventions. Distributed by the MIT Press Zone Books, Cambridge, Mass; New York, pp. 89–105.
Mattei, U., Nader, L., 2008. Plunder: When the rule of law is illegal. Blackwell, Malden Ma.
Matteucci, G., 2015. MANDATORY MEDIATION, THE ITALIAN EXPERIENC. Revista Eletrônica de Direito Processual – REDP 189–210.
McFARLANE, T., n.d. Mediation: The Future of Dispute Resolution in Contemporary Scots Family Law. Aberdeen Student Law Review.
McManus, M., Silverstein, B., 2011. Brief History of Alternative Dispute Resolution in the United States. The Cadmus Journal I, 100–105.
McThenia, A., Shaffer, T., 1985. For Reconciliation. Yale Law Journal 94, 1660–1668.
Mediazione finalizzata alla conciliazione delle controversie civili e commerciali, 2010.
Menkel-Meadow, C., 2016. The History and Development of "A" DR (alternative/appropriate dispute resolution) [WWW Document]. Völkerrechtsblog. URL https://voelkerrechtsblog.org/the-history-and-development-of-a-dr-alternativeappropriate-dispute-resolution/ (accessed 9.23.19).
Menkel-Meadow, C., 2015. Mediation, Arbitration, and Alternative Dispute Resolution (ADR), in: International Encyclopedia of the Social and Behavioral Sciences.

University of California, Irvine, USA.
Menkel-Meadow, C., 2014. Alternative and Appropriate Dispute Resolution in Context Formal, Informal, and Semiformal Legal Processes, in: The Handbook of Conflict Resolution: Theory and Practice. Peter T. Coleman, Morton Deutsch, and Eric C. Marcus., pp. 1–28.
Menkel-Meadow, C., 2013. The Historical Contingencies of Conflict Resolution. International Journal of Conflict Engagement and Resolution 2013, 32–55.
Menkel-Meadow, C., 2012. Informal, Formal and "Semi-Formal" Justice in the United States, in: Civil Procedure in Cross-Cultural Dialogue: Eurasia Context. Dmitry Malesin, Moscow, pp. 90–110.
Menkel-Meadow, C., 2010. Compromise, Negotiation, and Morality. Negotiation Journal 26, 483–499. https://doi.org/10.1111/j.1571-9979.2010.00285.x
Menkel-Meadow, C., 2009a. Maintaining ADR Integrity. Alternatives to the High Cost of Litigation 27, 1, 7–9.
Menkel-Meadow, C., 2009b. Empirical Studies of ADR: The Baseline Problem of What ADR is and What it is Compared to (SSRN Scholarly Paper No. ID 1485563). Social Science Research Network, Rochester, NY.
Menkel-Meadow, C., 2007a. Taking Law and _____ Really Seriously: Before, During and after "The Law." VANDERBILT LAW REVIEW 60, 555–595.
Menkel-Meadow, C., 2007b. Restorative Justice: What Is It and Does It Work? Annu. Rev. Law. Soc. Sci. 3, 161–187. https://doi.org/10.1146/annurev.lawsocsci.2.081805.110005
Menkel-Meadow, C., 2002. Practicing "In the Interests of Justice" in the Twenty First Century: Pursuing Peace As Justice. Fordham Law Review 70, 1761–1774.
Menkel-Meadow, C., 2001. ETHICS IN ADR: THE MANY "Cs" OF PROFESSIONAL RESPONSIBILITY AND DISPUTE RESOLUTION. Fordham Urban Law Journal 28, 10.
Menkel-Meadow, C., 1997. When Dispute Resolution Begets Disputes of its Own: Conflicts Among Dispute Professionals. UCLA LAW REVIEW 44, 1871–1933.
Menkel-Meadow, C., 1983. Legal Negotiation: A Study of Strategies in Search of a Theory. Am. Bar Found. res. j. 8, 905–937. https://doi.org/10.1111/j.1747-4469.1983.tb00221.x
Michel, J., 2010. Alternative Dispute Resolution and the Rule of Law in International Development Cooperation [WWW Document]. URL https://openknowledge.worldbank.org/bitstream/10986/18106/1/620960WP0J0D01200public00BOX358362B.pdf
Minitrial, n.d. . The Free Dictionary.
Mirimanoff, J.A., Pons, M., 2014. AMICABLE DISPUTE RESOLUTION : BIBLIOGRAPHY 219.
Mnookin, R.H., 2003. WHEN NOT TO NEGOTIATE: A NEGOTIATION IMPERIALIST REFLECTS ON APPROPRIATE LIMITS. UNIVERSITY OF COLORADO LAW REVIEW 74, 1077–1108.
Mnookin, R.H., 1998. Alternative Dispute Resolution. Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series Paper 232, 10.
Mnookin, R.H., 1993. Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict. THE OHIO STATE JOURNAL ON DISPUTE RESOLUTION 8, 235–349.

Mnookin, R.H., Kornhauser, L., 1979. Bargaining in the Shadow of the Law: The Case of Divorce. The Yale Law Journal 88, 950–997.
Moffitt, M.L., 2009. Three Things To Be Against ("Settlement" Not Included). Fordham Law Review 78, 1203–1245.
Moffitt, M.L., 2006. Before the Big Bang: The Making of an ADR Pioneer. Negotiation Journal 22, 437–443. https://doi.org/10.1111/j.1571-9979.2006.00112.x
Morris, C., 2013. The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws, in: MEDIATION IN ASIA PACIFIC: A PRACTICAL GUIDE TO MEDIATION AND ITS IMPACT ON LEGAL SYSTEMS. Hong Kong, pp. 68–116.
Morris, C., 2002. Definitions in the Field of Conflict Transformation [WWW Document]. Peacemakers.ca. URL http://www.peacemakers.ca/publications/ADRdefinitions.html (accessed 10.3.19).
New York State Unified Court System site [WWW Document], n.d. URL https://www.nycourts.gov/ip/adr/What_Is_ADR.shtml#Definitions
Nigmatullina, D., 2016a. Developing Efficient Dispute Resolution Solutions for International Commercial Disputes: Ways to Address Concerns Associated with the Combined Use of Mediation and Arbitration by the Same Neutral (PhD in Law Thesis). University of Western Australia.
Nigmatullina, D., 2016b. The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study. Journal of International Arbitration 33, 37–82.
Nolan-Haley, J., 2012. Mediation: The "New Arbitration." Harvard Negotiation Law Review 17, 61–95.
Palmer, M., Roberts, S., 2005. Dispute processes: ADR and the primary forms of decision-making, 2nd ed. ed. Cambridge University Press, Cambridge UK; New York.
Parisi, F., 2017. The Oxford Handbook of Law and Economics: Volume 3: Public Law and Legal Institutions. Oxford University Press.
Paulson, C.L., 2013. Evaluating Contracts for Customized Litigation by the Norms Underlying Civil Procedure. Ariz. St. L.J. 45, 471.
Pound, R., 1964. The Causes of Popular Dissatisfaction with the Administration of Justice. Crime & Delinquency 10, 355–371. https://doi.org/10.1177/001112876401000403
Rass-Masson, N., Rouas (Milieu), V., 2017. EFFECTIVE ACCESS TO JUSTICE.
Resnik, J., 2006. Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes are at Risk. Chicago-Kent Law Review 81, 521–570.
Resnik, J., 1995. Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication. Ohio State Journal on Dispute Resolution 10, 211–265.
Respondek, A., 2014. Five Proposals to Further Increase the Efficiency of International Arbitration Proceedings. Journal of International Arbitration 507–513.
Riskin, L.L., 1982. Mediation and Lawyers. OHIO STATE LAW JOURNAL 43, 29–60.
Rosales-López, V., 2008. Economics of court performance: An empirical analysis. European Journal of Law and Economics 25, 231–251.
Samuels, K., 2006. Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt.
Sanchez, V.A., 1996. Towards a History of ADR: The Dispute Processing Continuum

in AngloSaxon England and Today. THE OHIO STATE JOURNAL ON DISPUTE RESOLUTION 11, 39.
Sander, F.E.A., 1976. VARIETIES OF DISPUTE PROCESSING, in: ADDRESSES DELIVERED AT THE NATIONAL CONFERENCE ON THE CAUSES OF POPULARDISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE. pp. 111–134.
Scott, R.E., Gillette, C.P., n.d. The Political Economy of International Sales Law [WWW Document]. URL http://www.cisg.law.pace.edu/cisg/biblio/gillette-scott.html (accessed 10.1.19).
Shavell, S., 1995. Alternative Dispute Resolution: An Economic Analysis. The Journal of Legal Studies 24, 1–28.
Sherowski, E., 1996. Hot Coffee, Cold Cash: Making the Most of Alternative Dispute Resolution in High-Stakes Personal Injury Lawsuits. Ohio State Journal on Dispute Resolution 11, 521–536.
Shonk, K., 2019. Types of Mediation: Choose the Type Best Suited to Your Conflict. PON - Program on Negotiation at Harvard Law School. URL https://www.pon.harvard.edu/daily/mediation/types-mediation-choose-type-best-suited-conflict/ (accessed 10.2.19).
Silver, C.B., 1996. Models of Quality for Third Parties in Alternative Dispute Resolution. Ohio State Journal on Dispute Resolution 12, 37–93.
Sourdin, T., 2015. Evaluating Alternative Dispute Resolution (ADR) in Disputes About Taxation. The arbitrator and mediator 34, 19–31.
Sourdin, T., 2009. Mediation in the Supreme and County Courts of Victoria: Report prepared for the Department of Justice.
St. Aubyn, M., 2008. Law and Order Efficiency Measurement - A Literature Review (SSRN Scholarly Paper No. ID 1162120). Social Science Research Network, Rochester, NY.
Sternlight, J.R., 2010. Lawyerless Dispute Resolution: Rethinking a Paradigm (SSRN Scholarly Paper No. ID 1597360). Social Science Research Network, Rochester, NY.
Sternlight, J.R., 2005. Creeping Mandatory Arbitration: Is It Just? Stanford Law Review 57, 1631–1675.
Sternlight, J.R., 2000a. Is Binding Arbitration a Form of ADR?: An Argument That the Term “ADR” Has Begun to Outlive Its Usefulness. Journal of Dispute Resolution 2000.
Sternlight, J.R., 2000b. Protecting Franchisees from Abusive Arbitration Clauses. Franchise Law Journal 20, 45, 70–83.
Stipanowich, T., 2016. Insights on Mediator Practices and Perceptions. DISPUTE RESOLUTION MAGAZINE 4–9.
Stipanowich, T., Fraser, V., 2017. The International Task Force on Mixed Mode Dispute Resolution: Exploring the Interplay between Mediation, Evaluation and Arbitration in Commercial Cases. Fordham International Law Journal 40, 839–876.
Stipanowich, T.J., 2004. ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution. Journal of Empirical Legal Studies 1, 843–912.
Strong, S.I., 2016. Realizing Rationality: An Empirical Assessment of International Commercial Mediation. Washington and Lee Law Review 73, 114.
Studi, analisi e ricerche della DG-Stat [WWW Document], n.d. URL

https://webstat.giustizia.it/_layouts/15/start.aspx#/SitePages/Studi%20analisi%20e%20ricerche.aspx
Sussman, E., 2013. Med-Arb: an Argument for Favoring Ex Parte Communications in the Mediation Phase. WORLD ARBITRATION AND MEDIATION REVIEW 7, 14.
Sussman, E., 2009. Developing an Effective Med-Arb/Arb-Med Process. NYDRL 2, 71–74.
The European Commission official site [WWW Document], n.d. URL http://ec.europa.eu/justice/civil/access-justice/index_en.htm
The European Union Agency for Fundamental Rights official site [WWW Document], n.d. URL http://fra.europa.eu/en/theme/access-justice
The U.S. Department of Justice official site [WWW Document], n.d. URL http://www.justice.gov/atj
Traum, L., Farkas, B., 2017. THE HISTORY AND LEGACY OF THE POUND CONFERENCES. CARDOZO J. OF CONFLICT RESOLUTION 18, 677–698.
Tyler, T., 2001. Obeying the Law in American: Procedural Justice and the Sense of Fairness. Electronic Journal of the U.S. Department of State 6.
United Nations Convention on International Settlement Agreements Resulting from Mediation, 2019.
UNODC, 2011. Judicial integrity [WWW Document]. URL http://www.unodc.org/unodc/en/corruption/judicial-integrity.html
U.S. District Court - Eastern New York site [WWW Document], n.d. URL https://www.nyed.uscourts.gov/adr-program-statistics
Userguide - Online Dispute Resolution [WWW Document], n.d. URL https://ec.europa.eu/consumers/odr/userguide/?page=landing (accessed 9.30.19).
Voigt, S., 2016. Determinants of judicial efficiency: A survey. European Journal of Law and Economics 42, 183–208.
Voigt, S., El-Bialy, N., 2016. Identifying the determinants of aggregate judicial performance: Taxpayers' money well spent? European Journal of Law and Economics 41, 283–319.
Waldman, E.A., 1998. The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence. MARQUETTE LAW REVIEW 82, 155–170.
Wang, G., Yang, F., 2013. Mediation in Asia Pacific: a practical guide to mediation and its impact on legal system. CCH Hong Kong Ltd., Hong Kong.
Waters, N.L., Sweikar, M., 2006. Efficient and Successful ADR in Appellate Courts: What Matters Most? SSRN Electronic Journal.
Wells, L.T., 2007. Private justice system can only survive if parties consider it just. Financial Times.
Wesley, M., 2004. The Compleat Ombuds A Spectrum of Resolution Services. C P E R Journal 166, 6–12.
What makes civil justice effective?, 2013.
Wissler, R., 2010. The Effectiveness of Court-Connected Dispute Resolution in Civil Cases.
Zumeta, Z.D., n.d. Styles of Mediation: Facilitative, Evaluative, and Transformative Mediation [WWW Document]. Mediate.com. URL http://www.mediate.com/articles/zumeta.cfm (accessed 10.2.19).

Chapter 2. Advocates in Mediation: the Italian case

1. Introduction

This paper examines the influence of advocates' participation on mediation outcome in Italy. Based on the data from the Italian Chambers of Commerce during the period 2011-2017, we define whether advocates' involvement increases for the parties to the mediation the probability to enter into mediation agreement. We are interested in Italian mediation because of its mandatory character for selected categories of cases and the mandatory involvement of the professional lawyer (advocate) into these cases.

Mediation is one of the types of the Alternative Dispute Resolution (the "ADR"), the main feature of which is the non-confrontation character. The parties do not engage in discordance but rather in a process of rapprochement, and they themselves choose the means of resolving the dispute and play an active role in this process. They are responsible for finding the solution best suited to them. This consensual approach increases the likelihood that the parties are able to maintain their commercial or other relations. Specifically, this non-confrontation character together with the direct participation of the parties in the decision-taking is the main feature distinguishing mediation from the judiciary process. At the same time, the advocate is the process participant that guarantees the confrontation character of the process of dispute resolution as he/she ensures that the party has listened and his/her interests are protected. In case of advocate presence as the general rule, parties do not participate in

the dispute resolution, they can just wait when the process is concluded and they are informed about the outcome as well as possible further actions required from them (*e.g.*, paying damages, etc.).

The goal of this study is to estimate empirically the impact of advocates' participation on the mediation outcome in Italy. Thus, the analysis will focus on the evaluation of explanatory variables in terms of the probability for the parties to come to the agreement and close the dispute. For this paper, we will consider separately the advocates' participation on behalf of the plaintiff and the defendant. In addition, attention will be paid to a range of variables characterising the considered cases within the Chambers of Commerce. The probit and logit models will be utilised in order to study the relationship between the mediation outcome and the above mentioned factors. The empirical study is done based on the original dataset.

This paper proceeds as follows. The next section deals with a puzzle of mediation and advocates. It gives an overview of the mediation legislation in the European countries, in particular with attention to the requirements of the advocates' participation in the procedure. Also, the overview of the Italian rules will be provided. Section 3 provides the details of the data used. Then it proceeds in section 4 by presenting the methodology and the empirical approach. Section 5 goes on to discuss the findings of the analysis. Conclusions follow in section 6.

2. Mediation and Advocates: why to analyse

2.1. Mediation vs. Advocates

It is important to understand the nature of mediation and advocates' role in order to define whether the advocate's involvement is favourable for the mediation process.

Mediation is one of the ADR methods. It is essentially a negotiation facilitated by a neutral third party. Unlike arbitration, which is a process of ADR somewhat similar to court trial, mediation does not involve decision making by the neutral third party. ADR procedures can be initiated by the parties or maybe compelled by legislation, the courts, or contractual terms. Mediation is the option that is to be used when parties are

unwilling or unable to resolve a dispute by themselves, but do not want to refer to the court. Mediation is generally a short-term, structured, task-oriented, and "hands-on" process. The mediator involved in the process, assists to resolve the disputes. The mediator facilitates the resolution of the parties' disputes by supervising the exchange of information and the bargaining process. The mediator assists with finding a common ground and dealing with unrealistic expectations of the parties. Within the mediation process, the parties should understand better each other's business needs and look for a win-win solution that would uphold their respective interests. The result of the mediation always remains in the parties' hands. Below we provide a number of mediation definitions elaborated by International Organisations.

United Nations Commission on International Trade Law (UNCITRAL) defines mediation as "…a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute"[1]. International Chamber of Commerce defines mediation as "a flexible and consensual technique in which a neutral facility helps the parties reach a negotiated settlement of their dispute. The parties have control over the decision to settle and the terms of any agreement. Settlements are contractually binding and widely enforceable"[2]. Very similar mediation is understood by the European Union (the "EU"). Mediation is defined as "Structured and confidential process in which an impartial third person, known as a mediator, assists the parties by facilitating the communication between them for the purpose of resolving issues in dispute[3]. This or similar definition is suggested to be used by the EU Member States while making national laws on mediation[4].

[1] Article 2 of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation"), adopted 20 December 2018. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf.

[2] https://iccwbo.org/dispute-resolution-services/mediation/, visited 25 July 2019.

[3] CEPEJ, Ad hoc CEPEJ working group entrusted with the harmonisation of the definitions used by CEPEJ, Meeting report of the 4th meeting, January 23-24, 2019, Appendix II: Document CEPEJ(2018)2PROV8. Available at: https://rm.coe.int/rapportreunion-bologne-en-23-24-janvier-2019/1680933333.

[4] European Handbook for Mediation Lawmaking adopted at the 32th plenary meeting of the CEPEJ Strasbourg, 13 and 14 June 2019. Available at: https://rm.coe.int/cepej-2019-9-en-handbook/1680951928.

All the above definitions provide for the same features, *i.e.*, mediation is the process that should preserve the amicable settlement of the dispute between parties; the process should be facilitated by the neutral third party. The main purpose of the mediation is to find a win-win solution (if it exists) that would satisfy all the parties to the dispute. Such solution could satisfy only partially the interests of each party, so that they would have a chance to have better result while going for litigation, but mediation result should not have a loser and as such should not satisfy interests of one party only. In order to have the discussed positive outcome the parties should have full control over the process and try to find a win-win solution, *i.e.*, to conclude a mediation agreement; therefore, it is necessary that the parties participate personally at the process, so that they have immediate influence on the procedure.

In order to define whether an advocate could facilitate mediation, we need to understand what the advocate is and what his /her role is. According to the dictionary[5], an advocate is a person who speaks or writes in support or defence of a person, cause, etc.; a person who pleads for or in behalf of another; a person who pleads the cause of another in a court of law.

The role of an advocate is to offer independent support to those who feel they are not being heard and to ensure they are taken seriously and that their rights are respected. It is also to assist people to access and understand appropriate information and services. Advocates serve their clients; they serve to legitimate power and to produce legitimacy. Advocates are trained to be a part of the adjudication process. Even non-lawyers might provide some advice, including about legal compliance or drafting, but only advocates are specifically trained to litigate and they do it professionally; indeed, it is in the nature of adjudication that only advocates can litigate (Markovits, 2014). Thus, advocates are trained to litigate and they do it, advocates serve their clients to ensure that they are heard and their rights are protected.

Advocates are generally not interested in partial satisfaction of their clients' interested if there is a possibility to have full satisfaction. And as we noted above full satisfaction of one party's interests inevitably leads to a win-lose solution that is not a case for mediation.

[5] https://www.dictionary.com/browse/advocate.

Based on the above, we should conclude that the mission of advocate looks like not compatible with the nature of mediation. Advocates are not interested in finding a win-win solution in case there is a possibility to ensure a better win solution for the client. Therefore, it is intuitive that the legislation should not encourage the involvement of advocates into the mediation process, at least should not provide for the mandatory advocate participation into mediation.

In 2014, Directorate-General for Internal Policies has prepared the Report, which solicited the views of up to 816 experts from all over Europe, about using the Mediation Directive and the ways of its promotion in the Member States. Among measures to be implemented the Report considered "making legal assistance mandatory in mediations". With an average of 2.9 points, Member States' experts do not think legal assistance should be made mandatory in mediations. Malta, alone, viewed the measure as having a Positive Impact while fifteen countries (54%) viewed the measure as having a negative impact. It appears that the EU Member States do not support mandatory legal assistance for mediation (De Palo et al., 2014a). Italy's answer coincides with the average (2.9 points)[6].

2.2. Mediation in the European Union Countries

In the frame of the Council of Europe and the EU instruments the legislators of the European countries have decided to reinvent, alongside the traditional justice system, ADR instruments allowing for solutions that are more rapid, more simple and less costly, but also more human and more durable as they are better adapted to particular situations and better equipped to restore or transform social relationships. The European Union, *inter alia*, concentrated on promoting the idea of mediation as a way of "maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured"[7]. ADR methods have been a topic of discourse in many nations for over thirty years, at least in the field of civil and commercial disputes.

[6] The following scale is used: 1. Extremely negative impact; 2. Negative impact; 3. No significant impact; 4. Positive impact; 5. Extremely positive impact.

[7] Introduction to Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (Official Journal of the European Union 2008, item L 136/3).

In the EU, the increasing focus on mediation was a consequence of years of mounting concern about court costs and congestion. During this period, the use of alternatives to litigating civil and commercial disputes was almost entirely voluntary, and subject only to limited legislative encouragement throughout the Member States. Consequently, very few litigants used mediation to resolve these disputes. As such, use of ADR, including mediation, is encouraged in the European Union countries in order to avoid court-based litigation and in such a way to save time and money, thus enabling citizens to secure their legal rights in an efficient way[8]. The Mediation Directive, which concerns mediation in civil and commercial matters, applies in all EU countries[9]. Despite the Directive expressly states that it applies only to cross-border disputes, it encourages the use mediation throughout the Member States and provides five substantive rules that give direction to the development of mediation in the Member States. These are: (1) it obliges each Member State to encourage the training of mediators and to ensure high quality of mediation; (2) it gives every judge the right to invite the parties to a dispute to try mediation first if she/he considers it appropriate given the circumstances of the case; (3) it provides that agreements resulting from mediation can be rendered enforceable if both parties so request. This can be achieved, for example, by way of approval by a court or certification by a public notary; (4) it ensures that mediation takes place in an atmosphere of confidentiality. It provides that the mediator cannot be obliged to give evidence in court about what took place during mediation in a future dispute between the parties to that mediation; (5) it guarantees that the parties will not lose their possibility to go to court as a result of the time spent in mediation: the time limits for bringing an action before the court are suspended during mediation[10].

Mediation in the Member States is based on its national legislation. Below we suggest the table containing the information about the nature of the mediation (voluntary or mandatory/compulsory character) in the European countries and about the obligations of the lawyers/advocates to inform parties to the dispute about the possibility to resolve the dispute via mediation, without referring to the court and to assist during the mediation process.

[8] https://e-justice.europa.eu/content_eu_overview_on_mediation-63-en.do, last update 18.01.2019.
[9] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, *OJ L 136, 24.5.2008, p. 3–8.*
[10] Ibid.

Country	*Nature*	*Obligation to inform about mediation*	*Participation/assistance of advocate*
Austria[11]	Mostly voluntary, but some cases are mandatory	There is no general obligation for lawyers to advise about mediation, apart from the fields where the use of ADR is compulsory. Lawyers should generally be aware of mediation	Possible, but not mandatory
Belgium[12]	Voluntary	There is no duty for a lawyer to inform about mediation	Not mandatory, but allowed
Bulgaria[13]	Voluntary, mandatory for divorce cases only	There is no duty for a lawyer to inform about mediation	Not mandatory, but possible
Croatia[14]	Voluntary, aside from the mandates concerning certain labour disputes	There is no duty for a lawyer to inform about mediation	Not mandatory, but allowed

[11] The Austrian Act on Mediation in Civil Matters ('Bundesgesetz über Mediation in Zivilrechtssachen, Zivilrechts-Mediations-Gesetz'), came into effect in 2004.

[12] Mediation procedure is codified in one of the chapters of the general Code of Civil Procedure, called the Code judiciaire/Gerechtelijk Wetboek. The provisions on mediation were formally enacted on 21 February 2005, and they entered into force on 30 September 2005.

[13] Law on Mediation of 2004 with amendments made in 2007 and 2011 (Promulgated in State Gazette No. 110/17.12.2004, last amended, SG No. 27/1 April 2011); Regulation No 2 as of 15 March 2007 (last amended, SG No. 29/ 8 April 2011).

[14] The Mediation Act (NN, No 163/03), entered into force on 24 October 2003 was amended in 2009, and on 9 February 2011 a new Mediation Act was passed (NN, No 18/11), entered into force in full on the accession date of the Republic of Croatia to the European Union.

Cyprus[15]	Voluntary	Lawyers should inform their clients about the possibility of mediation	There is no express reference to duties of legal representatives and other professional participants
Czech Republic[16]	Voluntary	There is no duty for a lawyer to inform about mediation	Not mandatory, but allowed
Denmark[17]	Completely voluntary	There is no duty for a lawyer to inform about mediation	There are no specific provisions regarding duties of non-mediator participants in mediation
Estonia[18]	Mediation is generally voluntary. However, Article 11 of the Conciliation Act directs that mediation may be a mandatory precondition to	It is highly recommended that lawyers, notaries and court personnel promote mediation proceedings, but they are not obliged to inform parties about mediation	Estonian law does not establish any duties for legal representatives involved in mediation proceedings

[15] The Law "On Certain Aspects of Mediation in Civil Matters" No 159(1)/2012 was enacted to transpose the EU Mediation Directive into Cyprus's national law.
[16] The Mediation Act No 202/2012 as of 2 May 2012, became effective on 1 September 2012.
[17] The Danish Administration of Justice Act, the legal code governing court procedure includes the formal provisions for how legal actions are to be administered and includes clauses governing mediation.
[18] The Conciliation Act as of 18 November 2009, entered into force on 1 January 2010, implements the Directive 2008/52/EC into Estonian law.

	court proceedings when such a precondition is specifically stated in the law		
Finland[19]	Voluntary	Legal counsels are required to assess whether the dispute could be settled or resolved by use of ADR by considering a range of aspects, from economics to the emotional impact on the client. In the preliminary hearing at the start of judicial proceedings, the judge has a duty to explore whether there is a possibility that the parties could settle their dispute	Outside counsel may be present during mediation proceedings, but it is not mandatory
France[20]	Voluntary, except some family cases	Lawyers are not required to inform their clients of mediation before going to court	Outside counsel may be present during mediation proceedings, but it is not mandatory
Germany[21]	Completely	Lawyers should advise	Not mandatory, but

[19] The Mediation Act on Court Mediation and Confirming Settlements in Courts entered into force on 21 May 2011.

[20] A general framework for mediation was established by the Act *(loi)* of 8 February 1995, amended by the Order of 16 November 2011 which transposed EU Directive 2008/52/EC into French law.

	voluntary However, there is a piece of legislation that allows federal states to establish compulsory conciliation procedures as a pre-trial requirement for small claims cases (up to €750), defamation claims, neighbour disputes and certain claims arising from a violation of the General Equal Treatment Law	the most favourable way to resolve the dispute, so they should inform about ADR if this could favour the parties	allowed
Greece[22]	Completely voluntary	There is a duty to inform about mediation	According to the Mediation Act, parties **must be assisted** by lawyers during the mediation process
Hungary[23]	Voluntary, Court	There is no duty to	Not mandatory, but

[21] The Mediation Act (*Mediationsgesetz*), Article 1 of the Act to promote mediation and other procedures for out-of-court dispute settlement of 21 July 2012, published: *Bundesgesetzblatt I*¸ p. 1577, entered into force on 26 July 2012.
[22] The Mediation Act (Article 178-206 of Law 4512/2018 published 17/1/2018).
[23] Act No LV of 2002 on Mediation.

	referred in administrative court proceedings, mandatory in actions for the termination of parental custody rights	inform about mediation	allowed
Ireland[24]	Voluntary	There is a duty to inform about mediation	Outside counsel presence and/or representation during mediation sessions is allowed
Latvia[25]	Voluntary	There is no duty to inform about mediation	Outside counsel presence and/or representation during mediation sessions is allowed
Lithuania[26]	Voluntary	There is no duty to inform about mediation	The Mediation Law establishes no specific duties for legal representatives and other professional mediation participants

[24] Mediation Bill 2012 (Draft Bill), approved in March 2012.
[25] There is no separate act regulating mediation. Latvia implemented the Directive 2008/52/EC by making amendments to already existing Latvian laws.
[26] The Law on Conciliatory Mediation in Civil Disputes as of 15 July 2008 No X-1702 (Version of 1 January 2019 is used currently) transposed the Directive 2008/52/EC into Lithuanian law.

Luxembourg[27]	Entirely voluntary, apart from mandatory informational meeting on mediation for family disputes	Under the national rules for members of the bar, lawyers must consider all possibilities for resolving a dispute when advising clients, and they should, if applicable, provide information about using mediation	Outside counsel presence and/or representation during mediation sessions is allowed
Malta[28]	Voluntary	There is no duty to inform about mediation	Article 25 of the Act states that a party may "be assisted by an advocate, legal procurator or any individual designated by him before or during the mediation"
The Netherlands[29]	Voluntary	There is a duty to inform about mediation	Outside counsel may be present during mediation proceedings, but it is not mandatory
Poland[30]	Both contractual	There is no general	Allowed, but not

[27] The Act of 24 February 2012 creates a national legislative framework for mediation in civil and criminal matters by adding a new title to the New Code of Civil Procedure. The Act transposes Directive 2008/52/EC.
[28] The Mediation Act as of 21 Decembre 2004 (Chapter 474 of the Laws of Malta). The amending Act came into force on 14 January 2011 by L.N. 10/2011.
[29] Parliamentary Proceedings II 2012/3, 33 723.

	and court-referred mediation have a voluntary character	obligation, although the counsels (advocates) should advise about mediation in case it suits best to the case	mandatory
Portugal[31]	Voluntary	Lawyers have a duty to cooperate, always to the benefit of their respective clients, in order to avoid unnecessary claims; they must advise their clients towards a just and equitable settlement	Allowed, but not required
Romania[32]	Voluntary	Article 6 of the Mediation Law stipulates that "the judicial and arbitral courts, as well as any other authorities having jurisdictional duties should inform the parties of the possibility and benefits of using the mediation procedure and should advise them to use this method in order to settle the dispute	Allowed, but not required

[30] Every legal field has its own acts and codes which contain particular regulations about the mediation procedure, including Act of 17 November 1964 Code of Civil Procedure and the Act of 23 April 1964 Civil Code. Act of 10 September 2015 (valid starting 1 January 2016) introduced a number of changes to the Polish Code of Civil Procedure.
[31] The Mediation Law No. 29/2013 as of 20 April 2013.
[32] The Mediation Law 192/2006 was published in the Romanian Official Journal on 22 May 2006.

		between them"	
Slovenia[33]	Voluntary	The Judicial ADR Act requires the court, not lawyers necessarily, to provide the option of alternative dispute settlement to the parties in each case, unless the judge deems this to be inappropriate under the circumstances	Allowed, but not required
Slovakia[34]	Voluntary	There is no duty to inform about mediation	Allowed, but not required
Spain[35]	Voluntary	There is no duty to inform about mediation	Allowed, but not required
Sweden[36]	Voluntary	There is no duty to inform about mediation	Allowed, but not required
United Kingdom[37]	Voluntary	Solicitors are required, under the Civil Procedure	Allowed, but not required

[33] The Act on Alternative Dispute Resolution in Judicial Matters (ZARSS, *Uradni List RS* (UL RS; Official Gazette of the Republic of Slovenia) No 97/09 and 40/12 – Fiscal Balance Act (ZUJF)), adopted on 19 November 2009, came into force on 15 June 2010. The Mediation in Civil and Commercial Matters Act (ZMCGZ, UL RS No 56/08) as of 23 May 2008, published on 6 June 2008, and entered into force on 21 June 2008, transposed the provisions of the Directive 2008/52/EC into Slovenian law.

[34] The Mediation Act No. 420/2004 with further changes and amendments.

[35] Real Decreto - ley 5/2012 on mediation in civil and commercial matters, dated 5 March 2012, transferred the Directive 2008/52/EC into Spanish law. This Royal Decree was updated by Law 5/2012 dated 6 July 2012, which became effective on 28 July 2012.

[36] The Act on Mediation in Certain Civil and Commercial Disputes as of 16 June 2011 entered in force on 1 August 2011, transferred the Directive 2008/52/EC into Swedish law.

[37] The Civil Procedure Act of 1997, c. 12, introduced the Civil Procedure Rules, which were intended to enable courts to deal with cases justly, manage cases actively, and require parties to help the courts do so while encouraging the use of ADR.

		Act of 1997, to inform clients about ADR early in the proceedings	

As we can see, the only country that provides for mandatory participation of an advocate in the mediation process (apart from Italy, which will be discussed further) is Greece. However, many countries have adopted the rule in their legislation that requires the lawyers to inform their clients about the possibility to use mediation as an alternative to litigation.

2.3. Legislation background in Italy[38]

The first attempt to regulate mediation in Italy was mentioned in the Italian Civil Code in 1865. Further, mediation was used in the context of public safety provisions in 1931. Then in 1940, court mediation was added into the Code of Civil Procedure. During the 1960s, mediation was used in labour disputes, and in 1973, mediation and conciliation were formally established in the Code of Civil Procedure (Law No. 533). In December 1993, the chambers of commerce established mediation and arbitration commissions for the purpose of resolving disputes among companies and between companies and their clients. And in 2003, Legislative Decree 5/2003 initiated mediation for dispute resolution in certain financial and in all corporate matters.

However, mediation was not widely used in Italy until the Italian Parliament issued Law Decree No. 69 in June 2009, which recognised mediation as an option to be used for dispute resolution for civil and commercial disputes and also granted the Italian government the power to adopt a legislative decree on mediation, which resulted in the enactment of Legislative Decree No. 28 in 2010 (effective on 21 March 2011) and implemented mandatory mediation. Based on Decree No.28/2010, there was an obligation to refer to mediation before going to the court for certain civil cases. It

[38] For an overview of mediation history are used the Giuseppe De Palo and Chiara Massidda's contributions to *The Variegated Landscape of Mediation Regulation*, edited by Manon Schonewille and Dr. Fred Schonewille, and '*Lead 5.4 Million Thirsty Horses to Water, and the Vast Majority Will Drink*' by Giuseppe De Palo that are taken from "Rebooting' the mediation directive: Assessing the Limited Impact of its Implementation and Proposing measures to Increase the Number of Mediation in the EU", Brussels 2014.

should be understood that mandatory mediation was introduced in order to increase the efficient administration of civil justice by referring to the judicial process only if no other dispute resolution method can be pursued (Gabellini, 2010). The goal was to increase the instruments and methods available to solve disputes "in support" of the judicial system, thus, mediation was used in addition to — not as an alternative for — the judicial process (Ibid). However, the above obligation stated in Article 5.1 of Decree No. 28/2010 was challenged before the Constitutional Court of Italy, as it is violating Article 24 of the Italian Constitution[39]. The Constitutional Court held that the aforesaid provision on mandatory mediation is not in violation of the Italian Constitution or the European Directive on mediation.

However, the mandatory mediation was barred as it violated Article 77 of the Constitution[40]. According to the Court[41], the law was enacted in an "excess of legislative power" as the requirement for preliminary mediation was contained in the Governmental Act (Legislative Decree 28/2010), but that issue was not indicated by the Parliamentary Act (Law 69/2009), which delegated power to the executive branch to issue detailed rules on mediation.

After the mentioned Decision of the Constitutional Court, the original mediation rules were rewritten, opting again for mandatory mediation with several modifications, *inter alia*, litigants are now allowed to withdraw from the mediation process at the initial stage for a nominal cost if they believe that settlement is unlikely; several incentives and sanctions are added; the parties should participate in the mediation assisted with their advocates (Article 5.1-bis and Article 8). On 21 June 2013, Law Decree No 69 was approved by the Italian Government, and these new mediation rules were converted into law by the Parliament on 9 August 2013 (effective on 20 August 2013). Originally, the mandatory mediation rules were reintroduced for four years, ending in September 2017. In June 2017, the provision about mandatory mediation turned to be permanent[42].

[39] Article 24 of the Constitution of Italy: "Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law".
[40] Article 77 of the Constitution of Italy: "The Government may not, without an enabling act of the Parliament issue a decree having force of law".
[41] Decision No 272 dated 06 Decembre 2012, published on 12 Decembre 2012 in G.U.
[42] Law No 96 dated 21 June 2017, published 23 June 2017 in G.U.

According to Article 5 of Decree No. 28/2010, the following cases are subject to mandatory mediation: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, medical and sanitary malpractice, defamation by the press of other means of advertising, contracts, insurance and banking and finance. The new legislation also introduces new rules for mediation, as well as introducing a non-mandatory procedure, which applies to any civil and commercial litigation regarding matters other than those listed above.

Apart from the mandatory participation of the advocate in the mediation procedure, there are other advocate's obligations in regards to mediation. A lawyer must clearly inform his/her clients, in writing, about the option of mediation as an alternative to litigation. He/she must also provide information about tax breaks available to parties who participate in mediation. The client may void the attorney-client contract if the lawyer fails to provide this information.

It should be noted that despite the mandatory participation of the advocate is provided only to mandatory mediation, those who opted for voluntary mediation are also entitled to have the presence of an advocate, but not mandatory[43].

Thus, Italy is one of two EU countries that contain provision about mandatory assistance of advocate within the mediation process. Such a provision was introduced to the legislation upon lawyers' pressure after Decree 28/2010 was boycotted by Italian Bar Association (Matteucci, 2015). As a result, Italian mediation practice could be divided into several blocks that include the following periods (1) mediation was mandatory, but advocates were not obliged to participate, (2) mediation was voluntary only, no requirement about advocates' participation, (3) return of mandatory mediation and introduction of mandatory assistance of advocates.

Coming back to the beginning of this section and referring to the nature of mediation and role of advocate, we would conclude that advocates' participation should not favour mediation, but *vice versa*, too different are their goals. In order to confirm this hypothesis, this research is done based on the data provided by several mediation organisations.

[43] Circolare 27 novembre 2013 of the Ministry of Justice of Italy "Entrata in vigore dell'art. 84 del d.l. 69/2013 come convertito dalla l. 98/2013 recante disposizioni urgenti per il rilancio dell'economia, che modifica il d.lgs. 28/2010. Primi chiarimenti", prot.168322.

3. Data Description

This analysis is done based on the data provided by four Chambers of Commerce of Italy (of cities of Crotone[44], Pisa[45], Turin[46], and Verona[47]). The dataset covers the period of 2011 – 2017.

Appendix 1 provides the summary statistics for 5,305 cases. However, we only analyse 3,526 cases that have some outcome, positive – in case the parties come into agreement as the result of mediation and negative – in case mediation does not lead to an agreement between parties. The remaining 1,779 cases were skipped as there was no mediation procedure in the cases; they were "ignored" by mediators[48]. The data demonstrates that the majority of cases under analysis have negative outcome (about 80% of cases).

Our main interest is motivated by the puzzle described in Section 2. This paper would like to figure out whether the participation of advocate on behalf of the plaintiff and/or the defendant leads to the positive outcome of mediation. The data shows that plaintiffs were represented by advocates in 3,559 cases while only 1,336 where defendants was represented by the advocates–that could be partially explained by the requirement of the Mediation Law of Italy (Article 5.1-bis). In case of multiple plaintiffs/ defendants, if at least one of them is represented by the advocate, our "Advocate" variable equals 1; thus, the variable equals 0 only in case no one has an advocate.

[44] Servizio di Conciliazione della Camera di Commercio di Crotone è iscritto al n. 25 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010.

[45] Lo Sportello di Conciliazione della Camera di Commercio I.A.A. di Pisa è iscritto al n. 13 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010.

[46] Servizio di Conciliazione della Camera di Commercio di Torino è iscritto al n. 122 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010, cancellato dal Registro il 8/11/2017.

[47] Lo Sportello di Conciliazione della CCIAA di Verona è iscritto al n. 42 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010.

[48] The cases that are ignored, *inter alia*, include the following: the cases are presented to more than one mediation institution; cases are not subject to mediation according to the law; absence of the decision of the parties to mediate the case.

Figure 2.1. plots data on Advocates' presence in mediation by years. It includes separately data on advocates' presence for plaintiffs, defendants, as well as cases where both parties were assisted by advocates.

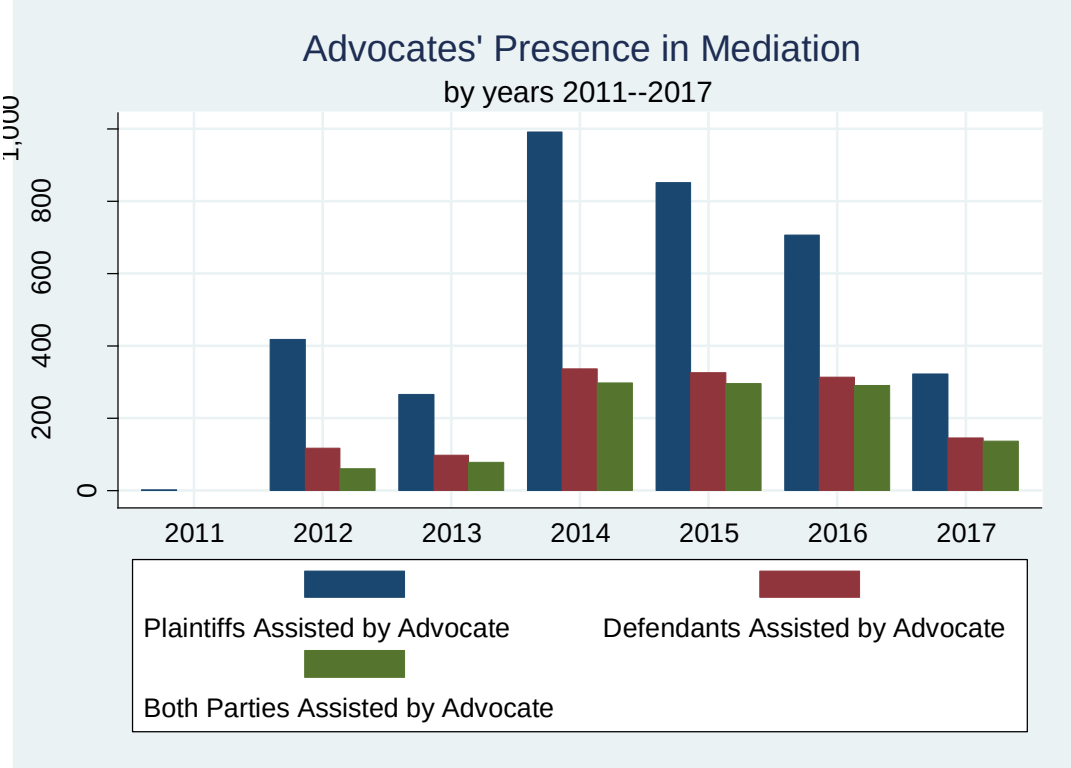

Figure 2.1. Advocates' Presence in Mediation

For the analysis, the following characteristics of the cases are also used: the price of the case (requested by the plaintiff, not adjudicated upon the procedure), nature of the procedure (mandatory or voluntary), duration of the procedure (in days), number of plaintiffs and defendants involved into the case. In addition, we control the results for the moment when the mediation procedure started. The variable "Reform" that indicates whether the mediation started before or after 20 August 2013 when the provision on the mandatory participation of the advocate in cases of mandatory mediation was added.

We do not analyse the merit of the cases because of the peculiarity of the dataset provided. We have description of the case merit only for mandatory mediation, and the voluntary mediation (about 15% of cases) does not contain the description of the case,

but it is just included into the group "other". Therefore, case merit is partially covered by "nature of case" variable.

4. Empirical Analysis

4.1. Methodology

The dependent variable (the outcome of mediation) is a categorical variable, which can take on the meanings: 1 (positive) in case where there is a mediation agreement between the parties or 0 (negative) if the mediation does not end with an agreement. The main independent variables of interest are also categorical variable. Therefore, we need to take a decision on which method applicable to categorical variables fits better our dataset. Based on the model interference, which will be discussed more in Robustness section, we see that both logit and probit full models could be used for our data analysis (Agresti, 2007). As known, the difference between logit and probit models lies in the assumption about the distribution of the errors (Hanck et al, 2019). For purposes of this research, it is decided to adopt both methodologies and to verify whether the result is stable.

The probit model that we wish to fit is:

$$\Pr(Y = 1 \mid X_1 \ldots X_{10}) = \Phi(\beta_0 + \beta_1 AvvP + \beta_2 AvvD + \beta_3 PoC + \quad [1]$$

$$\beta_4 Ref + \beta_5 Dur + \beta_6 Nat + \beta_7 NumP + \beta_8 NumD + \beta_9 Year_{fe} + \beta_{10} Province_{fe})$$

where Y is the case outcome, Φ is the cumulative normal distribution. We also have a vector of regressors X, and year and province fixed effects. The parameters β are estimated by maximum likelihood.

As for the logit model,

$$\Pr(Y = 1 \mid X_1 \ldots X_{10}) = F(\beta_0 + \beta_1 AvvP + \beta_2 AvvD + \beta_3 PoC + \beta_4 Ref + \quad [2]$$

$$\beta_5 Dur + \beta_6 Nat + \beta_7 NumP + \beta_8 NumD + \beta_9 Year_{fe} + \beta_{10} Province_{fe})$$

where Y is the case outcome, and $F(z) = e^z/(1 + e^z)$ is the cumulative logistic distribution. X is the vector of case characteristics. Year and province fixed effects are added.

Among the variables used in this analysis, Price of the case (PoC), Duration and Number of parties are continuous variables while the others are categorical variables. We control for Year and Province (time and entity fixed effects) that are used as interaction. The combined fixed effect model allows to eliminate bias from unobservables that change over time (years) but are constant over provinces, as well as it controls for factors that differ across provinces but are constant over time (Hanck et al, 2019).

4.2. Results

Our results are shown in Table 2.2, which includes the results for both logit and probit models. Referring to Equations 1 and 2 above, our interest is the probability to have a positive outcome of mediation in case of presence of advocate representing the plaintiff and/or defendant. Column 1 of Table 2.2 demonstrates the results of probit regression, and Column 2 of the Table contains the Logit regression results. Row 1 (AvvP) of Table 2.2 reveals the negative effect of the presence of plaintiff's advocates on the probability to have an agreement between parties of mediation. The result is statistically significant at 1% level. Row 2 (AvvD) of Table 2.2 provides for the effect of having an advocate on behalf of the defendant. And here the result produced by both models is positive, which means that in contrast to the advocates representing the plaintiffs, the presence of advocates representing defendants force the positive outcome of mediation, *i.e.*, making the mediation agreement. This result is significant at 5% level.

For robustness purposes we also run logit regression[49] for Turin Chamber of Commerce. The obtained results are generally the same as for the full population of

[49] As we demonstrated both models produce compatible results; therefore, we run logit regression only for additional check for a separate Chamber of Commerce. The Turin Chamber of Commerce is chosen as the Turin dataset contains more cases, and because the dataset contains the population of cases that will not be changed in future (subsequently the result will remain stable even in future) as the Chamber

cases of four chambers (positive influence for defendants' advocates and negative influence for plaintiffs' advocates). Both results are statistically significant for Turin data at 1% level.

4.3. Robustness

The data provided by different Chambers of Commerce is not identical in the meaning of number of cases and their distribution within the periods, for instance, not all the datasets contain information for all the years within the period under research (2011 – 2017), also some information is missing as each dataset was completed by the chamber representatives based on their specific practice. Therefore, the MCAR test was run in order to test whether there is a relationship between the missing data and or any values, observed or missing (Greene, 2012). In such a way we confirm that some data is missing in random and it does not influence our results.

This research deals with a binary outcome and as noted the binary logit and probit regression models are suitable models to fit for this type of data (Agresti, 2007). In order to be sure that the chosen model suits the data, we proceeded with the fitting test and compared the Akaike's information criterion / Bayesian Information Criterion of Different models (Williams R, 2018). Based on the tests results, we defined that both logit and probit models are suitable. Table 2.1 provides for the detailed analysis of the suggested models and their comparison that allowed taking a decision. Both models produced similar statistically significant results.

In addition, the ROC curves were drawn for the models. The area under the curves of approximately 0.8 indicates acceptable discrimination for the models (Powers, 2011; Tilford et al., 1995)[50].

As long as the data was provided by the Chambers of Commerce of four provinces, cases from the same province tend to be correlated. In addition, corresponding information on the chamber of commerce where the mediation was done could be the same for cases from the same chambers. Therefore, in estimating the

in case does not provide mediation services anymore, its registration in the Mediation register is cancelled in 2017.

[50] Please refer to table 2.1 for Curves themselves.

standard error of the parameter estimates, the usual maximum likelihood method cannot be used, as it assumes the observations to be independent (Jayatillake at al, 2001). Therefore, an adjustment is required for this province effect in estimating the standard errors of the parameter estimates. The standard errors are adjusted based on the Huber formula (Freedman David A., 2006).

In addition, as noted above in para 4.1. the year and entity fixed model is used to capture possible bias from unobserved factors that could change over time being constant over provinces, as well as it controls for factors that differ across provinces being constant over time. Logically, running logit regression for Torino chamber of commerce in order to control the obtained result, the data is controlled for time fixed effects only.

To summarise, our regressions' results are statistically significant and provide for one more puzzling result, about the dependence of the influence of the advocate based on the party he/she represents.

5. Discussions

Our empirical results reveal a result that does not give a full confirmation of our hypothesis of what the influence of the advocates should be. Based on the completely different nature of two institutions and taking into account the role of the advocates we have described in detail in Section 2 above, we would expect that the presence of the advocate in the mediation process should have a negative influence on the result of mediation. However, our results demonstrate that the advocates' influence on mediation outcome is not as straightforward as expected. The influence depends on the party of the conflict that is represented by the advocate.

We have received the empirical confirmation of our feeling as for the advocates representing plaintiffs. At the same time, our results demonstrate that our expectation of the influence of the advocates representing the defendant is not confirmed, *i.e.*, that the advocates' presence in such a case is favourable.

Our research covered the periods when the presence of advocates was mandatory according to the law and those when this legal provision was invalid. The results remain stable for the whole period that forces us to consider that the results are not depending on the legislation requirement and introduction of the mandatory presence of the advocate within the mediation procedure. We consider that the factor that defines the influence of the advocate within the mediation procedure is its role and nature of the advocate *per se* in combination with the features of the mediation as the procedure and its goals. As according to the law, the advocate must represent the plaintiff in cases of the mandatory mediation, we have a situation of the forced participation of the plaintiff and his/her advocate in the procedure. Thus, the advocate, in this case, serves his/her client and do his/her best to have full satisfaction of the client's interests. As discussed above, mediation is not a place for full satisfaction of the interests, but rather a place to look for a win-win solution. Therefore, plaintiffs' advocates, often willing to move to litigation influence negatively on the possibility to have a mediation agreement. Simultaneously, the defendant generally agrees more voluntary for a partial result as the process is not initiated by him/her, and his/her advocate assists to close the conflict with the minimal loss for the client.

Our results demonstrate that the introduction of the mandatory advocates' participation has not influenced positively on the level of positive outcomes with their participation. Therefore, we consider that such a legislation requirement does not favour mediation development in Italy, but even produces an opposite result as without advocate some plaintiffs maybe could be more "*pro-mediative*". We believe that these results have straightforward policy implications, especially in Italy, where the requirement about mandatory advocates became permanent recently. The results could be used while considering possible changes to the mediation regulation in Italy.

6. Conclusions

This paper provides evidence on the puzzling role of advocates in mediation. It demonstrates that in the case of advocates' presence, the outcome of mediation depends mainly on the role and goals of the advocate within the process of dispute resolution.

Beyond the scholarly interest, such results have also straightforward policy implications. Italy, that declares its willingness to develop ADR, including mediation, could consider the possibility to leave the parties to the dispute to decide on their own on the necessity to have or not to have an advocate. Of course, we cannot be sure that the parties stop to go to a mediator with the legal counsel as soon as it is not mandatory anymore, but we can expect that as soon as they realise that the advocate is not a must anymore, they are free to make a different decision. Surely, we will be able to assess the influence of the change only after the legislation is changed and effective for a period of time, *i.e.*, the practice of its application is available.

References

Agresti, A., An introduction to categorical data analysis, John Wiley & Sons, Inc., New York, 2007.

Agresti. A., Categorical data analysis, Wiley InterScience, New York, 2002.

Freedman David A., On The So-Called "Huber Sandwich Estimator" and "Robust Standard Errors", UC Berkeley, September, 2006.

Gabellini, Rachele (2010), "The Italian Mediation Law Reform," *ADR Bulletin*: Vol.12: No.3, Article 4.

Greene William H., Econometric Analysis: International Edition, Pearson Education Limited, 2012.

Hanck Ch., Arnold M., Gerber A., and Schmelzer M., Introduction to Econometrics with R, *Department of Business Administration and Economics University of Duisburg-Essen, Essen, Germany* // Last updated on Friday, August 30, 2019.

Huber, P. J. 1967. The behavior of maximum likelihood estimates under non-standard conditions. *Proceedings of the Fifth Berkeley Symposium on Mathematical Statistics and Probability* 1: 221–233.

Jayatillake R.V., Sooriyarachchi M.R. and. Senarathna D.L.P, Adjusting for a cluster effect in the logistic regression model: an illustration of theory and its application. *Journal of the National Science Foundation of Sri Lanka* 2011 39 (3): 211-218

Matteucci G., Mandatory mediation, the Italian experience, *Revista Eletrônica de Direito Processual – REDP*. Volume 16. Julho a dezembro de 2015 Periódico Semestral da Pós-Graduação Stricto Sensu em Direito Processual da UERJ.

Markovits, Daniel, "WHAT ARE LAWYERS FOR?" (2014). Faculty Scholarship Series. 4924. Available at: https://digitalcommons.law.yale.edu/fss_papers/4924

Powers D.M.W., Evaluation: from precision, recall and f-measure to ROC, informedness, markedness & correlation, *Journal of Machine Learning Technologies*, Volume 2, Issue 1, 2011, pp. 37-63.

"Rebooting' the mediation directive: Assessing the Limited Impact of its Implementation and Proposing measures to Increase the Number of Mediation in the EU", Brussels 2014.

Rogers, W. H. 1993. Regression standard errors in clustered samples. *Stata Technical Bulletin,* Vol. 13, pp. 19–23. Reprinted in *Stata Technical Bulletin Reprints*, Vol. 3, pp. 88–94.

Tilford J. M., Roberson P. K., and Fiser D. H., Using lfit and lroc to evaluate mortality prediction models. *Stata Technical Bulletin,* Vol. 28, pp. 14-18.

Williams, R. L. 2000. A note on robust variance estimation for cluster-correlated data. *Biometrics* 56: 645–646.

Williams R. Scalar Measures of Fit: Pseudo R2 and Information Measures (AIC & BIC), Last revised January 14, 2018, available at: https://www3.nd.edu/~rwilliam/stats3/L05.pdf.

Table 2.1. Models comparison

Akaike's information criterion and Bayesian information criterion test

Model	Obs	ll(null)	ll(model)	df	AIC	BIC
Logit	3,436	-1663.622	-1441.048	3	2888.095	2906.521
Probit	3,436	-1663.622	-1439.988	3	2885.975	2904.401
OLS	3,436	-1650.519	-1402.987	3	2812.174	2830.6

Fitstat test

Model				
Measures of Fit for Logit of Outcome	Log-Lik Intercept Only:	-1663.622	Log-Lik Full Model:	-1441.048
	D(3416):	2882.095	LR(2):	445.149
			Prob > LR:	0.000
	McFadden's R2:	0.134	McFadden's Adj R2:	0.122
	Maximum Likelihood R2:	0.122	Cragg & Uhler's R2:	0.196
	McKelvey and Zavoina's R2:	0.217	Efron's R2:	0.140
	Variance of y*:	4.202	Variance of error:	3.290
	Count R2:	0.820	Adj Count R2:	0.043
	AIC:	0.850	AIC*n:	2922.095
	BIC:	-24931.193	BIC':	-428.865

Measures of Fit for Probit of Outcome	Log-Lik Intercept Only:	-1663.622	Log-Lik Full Model:	-1439.988
	D(3416):	2879.975	LR(2):	447.269
			Prob > LR:	0.000
	McFadden's R2:	0.134	McFadden's Adj R2:	0.122
	Maximum Likelihood R2:	0.122	Cragg & Uhler's R2:	0.197
	McKelvey and Zavoina's R2:	0.226	Efron's R2:	0.137
	Variance of y*:	1.291	Variance of error:	1.000
	Count R2:	0.818	Adj Count R2:	0.034
	AIC:	0.850	AIC*n:	2919.975
	BIC:	-24933.313	BIC':	-430.984
Measures of Fit for Regress (OLS) of Outcome	Log-Lik Intercept Only:	-1650.519	Log-Lik Full Model:	-1403.087
	D(3416):	2806.174	LR(2):	494.863
			Prob > LR:	0.000
	R2:	0.134	Adjusted R2:	0.130
	AIC:	0.828	AIC*n:	2846.174
	BIC:	-25007.114	BIC':	-478.579

The model with the smaller BIC is preferred, *i.e.* if BIC1 – BIC2 < 0, model 1 is preferred. If BIC1 – BIC2 > 0, the second model is preferred.

The following guidelines for magnitude of BIC difference are proposed (Raftery, 1995):

Absolute difference	Evidence
0-2	Weak
2-6	Positive
6-10	Strong
>10	Very Strong

Receiver/relative operating characteristic curve for Logit

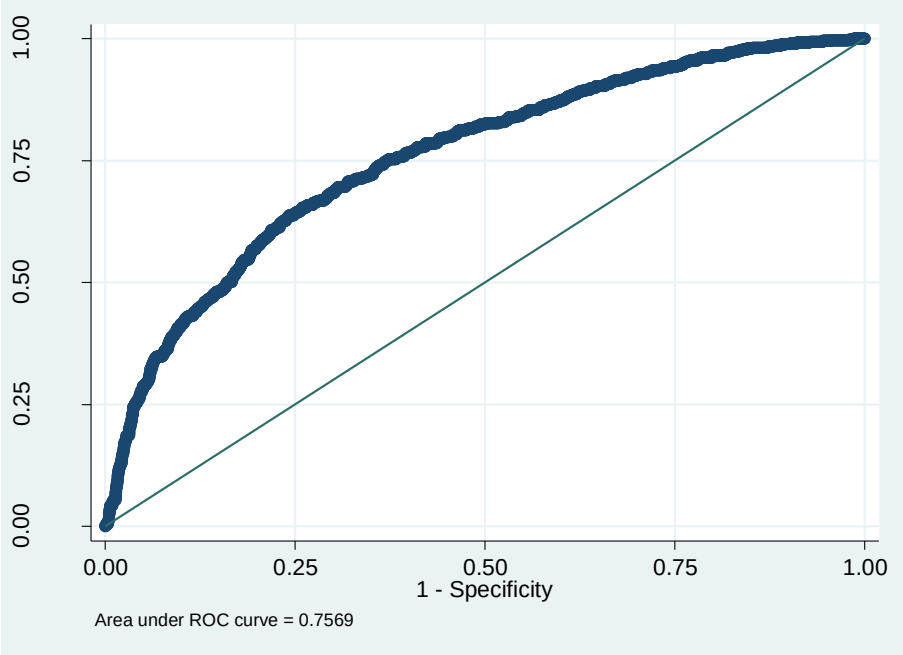

Figure 2.2. ROC curve Logit

Receiver/relative operating characteristic curve Probit

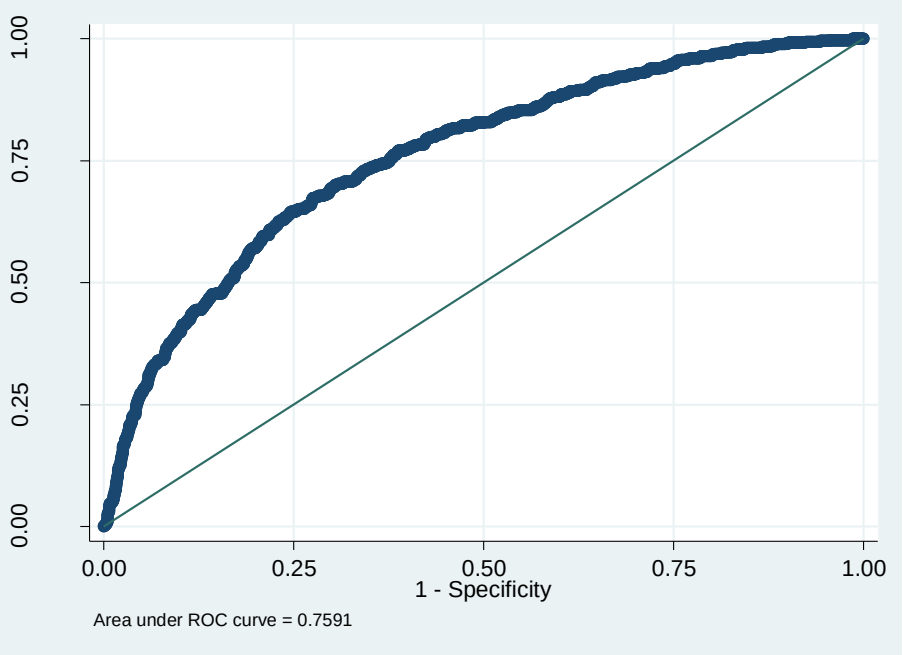

Figure 2.3. ROC curve Probit

Table 2.2. Probit and Logit Models

VARIABLES	(1) Probit	(2) Logit	(3) Logit Torino
AvvP	-0.274***	-0.466***	-0.574***
	(0.0297)	(0.0566)	(0.184)
AvvD	0.604**	1.139**	0.950***
	(0.287)	(0.519)	(0.157)
PoC	-0.0910**	-0.153*	-0.264***
	(0.0425)	(0.0826)	(0.0393)
Reform	-0.202	-0.313	0.0255
	(0.359)	(0.639)	(0.539)
Duration	0.00519***	0.00885***	0.00768***
	(0.000897)	(0.00193)	(0.00175)
Nature	0.109	0.190	0.437**
	(0.0854)	(0.159)	(0.204)
NumP	-0.0184***	-0.0325**	-0.0507
	(0.00572)	(0.0139)	(0.0672)
NumD	-0.0110	-0.0157	-0.0103
	(0.0415)	(0.0735)	(0.0521)
Province FE	YES	YES	NO
Year FE	YES	YES	YES
Constant	1.093***	1.871***	0.282
	(0.319)	(0.598)	(0.398)
Observations	3,436	3,436	2,057

Robust standard errors in parentheses

*** p<0.01, ** p<0.05, * p<0.1

Chapter 3. Determinants of the Mediation Duration: the Italian case

1. Introduction

This paper is a study of the duration of mediation in Italy. The study is done based on the data from the Italian Chambers of Commerce during the period of 2011—2017. The duration of mediation is considered to be one of its features/advantages. Being one of the ADR types, mediation ensures time savings in comparison with adjudicative types of dispute resolution (*e.g.*, litigation). According to the analysis made by the European Parliament, for each dispute, if all cases in the EU went to mediation first, and the procedure succeeded in 50% of the cases, the average number of saved days would be 240 days; if mediation succeeded in 70% of the cases, time savings would increase up to 354 days (De Palo et al., 2018).

As mediation should ensure the savings of time, it should not last long, however, it should last enough to achieve an agreement between the parties. The maximum duration is generally fixed by the agreement to mediate and should be within the maximum term defined by the legislation. The question arises what the optimal mediation duration is and what the determinants that influence the variance in duration are.

The mediation duration cannot be considered as the perfect proxy for the success of mediation, but it for sure could be used in order to demonstrate the parties' willingness to mediate, *i.e.*, their attitude and keen to look for a case solution.

The goal of this study is to estimate empirically the impact of different variables on the longevity of mediation cases in Italy. Thus, the analysis will focus on the evaluation of explanatory variables in terms of the probability for the parties to come to the agreement and close the dispute. For this paper, attention will be paid to variables characterising the cases considered within the Chambers of Commerce of Italy. The survival analysis, in particular, Cox and Weibull models will be utilised in order to study the influence of the above-mentioned variables on the mediation duration. The empirical study is done based on the original dataset.

This paper proceeds as follows. In the next section, an overview of the requirements as for mediation duration will be given, mainly focused on the duration of the mediation as the advantage. Also the short overview of the legislation and practice about mediation duration in the European countries generally and Italy, in particular, will be done. Section 3 provides the details of the data used. Then it proceeds in section 4 by presenting the methodology and the empirical approach. Section 5 goes on to discuss the findings of the analysis. Conclusions follow in section 6.

2. The Mediation Duration: why it is important

2.1. Duration as the mediation advantage

Mediation is one of the ADR methods, and one of its advantages that distinguish it from adjudication methods of dispute resolution is a shorter duration. Mediation should be concluded within a maximum term defined by the law and agreement to mediate. As mediation is used by the parties if they were unable to resolve a dispute by themselves, but do not want to/cannot refer to the court, the parties themselves define the procedure of mediation including the process duration.

According to the European e-Justice Portal, Mediation is generally faster and, therefore, usually cheaper than ordinary court proceedings. This is especially true in

countries where the court system has substantial backlogs and the average court proceeding takes several years ("European e-Justice Portal - Mediation in Member States," n.d.).

Access to justice is the fundamental right according to Article 6 of the European Convention on Human Rights ("European Convention on Human Rights," 1950). Access to justice means not only the principle of the equity before the law but also the efficiency of the process. Absence of the judiciary efficiency, excessive duration and cost of justice provoke negative impact on economic growth and general welfare (Johnson and McMillan, 2002; Padrini et al., 2009). The same right to access to justice is guaranteed by the Italian Constitution[1] (Senato della Republica, 1947). However, according to the World Bank Report for 2019, 1,120 days are required in Italy to recover a commercial credit (World Bank, 2019). The European Commission for the Efficiency of Justice (CEPEJ), in its Report for 2018 (data 2016) calculates 514 days of disposition time for the first instance civil and commercial litigious cases in Italy (Special file publication 2018 Edition of the CEPEJ report, 2018). At that one of empirical studies of Italian civil judicial system demonstrates that "a 10 percent reduction in the duration of civil trials increases firm-level employment by 2.9 to 3.6 percentage points" and thus, "law enforcement is a primary driver of economic development" (Pezone, 2018).

Due to above issues with access to justice in Italy and taking in mind the famous legal maxim that *Justice delayed is justice denied*, Italy has been experimenting with a hybrid model of mediation in a limited area of civil litigation, amounting to only 10 percent of the total amount of civil caseload[2]. The parties assisted with their advocates can choose to participate in mediation after the mandatory participation in the first meeting (paying 40 EURO for participation) within 30 days upon applying for mediation. As a result of the introduction of mandatory mediation, the amount of cases subject to mandatory mediation decreased by 35 percent compared to the amount of cases applied to the state courts. In 2018, about 20 thousands extrajudicial agreements

[1] According to article 111 of the Constitution "The law provides for the reasonable duration of trials".
[2] According to Article 5 of Decree No. 28/2010, the following cases are subject to mandatory mediation: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, medical and sanitary malpractice, defamation by the press of other means of advertising, contracts, insurance and banking and finance.

were done via mediation. Thus, Italian experience is used as an example of a successful use of mediation and two documents approved this year, 13 and 14 June by CEPEJ: the European Handbook for Development of National Legislation on Mediation (Council of Europe and European Commission for the Efficiency of Justice, 2019a) and Guidelines on designing and monitoring mediators training schemes (Council of Europe and European Commission for the Efficiency of Justice, 2019b) are based partially on the Italian success experience (D'Urso, 2019).

One more project that should decrease trials duration in Italy was launched in the Court of Florence and currently is being extended in other courts. The project "Giustizia semplice 4.0" (Tribunale di Firenze, 2018) involves the support of Florence court judges by university fellows (with specific skills in the field of mediation). The fellows provide the judge with all the elements necessary for an adequate assessment of the negotiability and mediatability of the dispute and give a suggestion whether to mediate. This project as well could be considered successful as about 55 percent of cases were resolved outside the court (D'Urso, 2019).

Both projects, *i.e.*, introduction of the mandatory mediation (mandatory first meeting) and assigning fellows specialised in mediation to the judges contribute to enhance the efficiency of Italian civil justice through decreasing its duration via decreasing the amount of cases to be resolved.

It should be noted though that mediation decreases the case resolution duration only if the case has a positive outcome, *i.e.*, the mediation agreement is done, otherwise, it could become one more layer in the dispute resolution pyramid that increases the duration rather decreasing them.

However, the data demonstrates that it is enough to have rather low success rate in order for mediation to decrease the dispute resolution duration. The calculation was done while preparing a study on rebooting the mediation directive (De Palo et al., 2014). There are two approaches of calculating days for litigation: the one-step approach when parties go directly to litigation, the two-step approach in case parties go to litigation upon failing mediation (irrespective of the reasons of mediation, *i.e.*, it could be voluntary or required by law/judge).

In order to calculate the average time of the two-step approach, the assumption of the mediation success rate is done. The formula is the following:

(Mediation Time x Success Rate) + [(Litigation Time x Unsuccessful Rate) + (Mediation Time x Unsuccessful Rate)] = Days

With a conservative 50% mediation success rate, the average duration of a dispute in the EU decreases from 566 days to 326 days[3].

(43 x 0.5) + [(566 x 0.5) + (43 x 0.5)] = 326 days

With a 70% mediation success rate, the average duration of a dispute in the EU decreases from 566 days to 212.8 days.

For the duration of the time between the one-step approach (only litigation) and a two-step approach (mediation then litigation) to be equal, the mediation success rate should decrease to about 9%.

Thus, the success rate of Italian mediation declared by the Ministry of Justice for the year 2018 (Ministero della Giustizia, 2019) should guarantee the decrease significantly the duration of civil cases. The success rate declared is approx. 45%[4] (approx. 27% of settlement).

2.2. Mediation duration, legislation requirements

The Mediation Directive, which concerns mediation in civil and commercial matters, applies in all EU countries (European Parliament and COUNCIL OF THE EUROPEAN UNION, 2008). The Directive does not establish the maximum term of the mediation duration; however, it gives the guidelines for the EU Member states: "The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process" (Ibid, preamble).

[3] Average mediation duration is 43 days, litigation duration is 566 days (De Palo et al., 2014b).

[4] Ministry of Justice calculates "Success rate" for all cases, in which both parties participated in meetings following the first information one, while for this paper further the success rate is calculated only for cases where the settlement is done (*i.e.*, mediation agreement is done).

The European Handbook for Mediation Lawmaking (Council of Europe and European Commission for the Efficiency of Justice, 2019a) suggests that the duration of mediation should be stated by the national legislation for mandatory/court-referred mediation (Article 4.2.2) and defined by parties in the agreement to mediate for voluntary mediation (Article 5.1.3). In both cases, legislation can foresee the possibility to prolong such a "maximum" duration.

Mediation in the Member States is based on their national legislation. Below we suggest the table containing the information about the average duration and legislation requirements about duration in the European countries.

Country	***Average duration of mediation (in days)***[5]	***Duration of mediation according to law***
Austria[6]	98	no legal deadline or maximum duration
Belgium[7]	56	three months for court-annexed mediation
Bulgaria[8]	39	six months from the beginning of the procedure
Croatia[9]	63	According to the Rules of Mediation, mediation is concluded

[5] Information is taken from "Rebooting' the mediation directive: Assessing the Limited Impact of its Implementation and Proposing measures to Increase the Number of Mediation in the EU", Brussels 2014.

[6] The Austrian Act on Mediation in Civil Matters ('Bundesgesetz über Mediation in Zivilrechtssachen, Zivilrechts-Mediations-Gesetz'), came into effect in 2004.

[7] Mediation procedure is codified in one of the chapters of the general Code of Civil Procedure, called the Code judiciaire/Gerechtelijk Wetboek. The provisions on mediation were formally enacted on 21 February 2005, and they entered into force on 30 September 2005.

[8] Law on Mediation of 2004 with amendments made in 2007 and 2011 (Promulgated in State Gazette No. 110/17.12.2004, last amended, SG No. 27/1 April 2011); Regulation No 2 as of 15 March 2007 (last amended, SG No. 29/ 8 April 2011).

[9] The Mediation Act (No 163/03), entered into force on 24 October 2003 was amended in 2009, and on 9 February 2011 a new Mediation Act was passed (NN, No 18/11), entered into force in full on the accession date of the Republic of Croatia to the European Union.

		if a settlement is not reached within 60 days from the beginning of mediation, but this time limit may be extended by agreement between the parties
Cyprus[10]	26	According to the Mediation Law in Cyprus, a judicial referral mediation process cannot last more than three months unless the parties do not manage to reach a settlement and they request for an extension of another three months (*i.e.*, max. duration total of six months)
Czech Republic[11]	75	According to Section 100(3) of the Civil Procedure Code (as amended) the court may suspend its proceedings for up to three months for the first mediation session
Denmark[12]	56	45 days since the referral of the case to the mediator, unless the parties have agreed otherwise[13]
Estonia[14]	104	no legal deadline or maximum duration

[10] The Law "On Certain Aspects of Mediation in Civil Matters" No 159(1)/2012 was enacted to transpose the EU Mediation Directive into Cyprus's national law.
[11] The Mediation Act No 202/2012 as of 2 May 2012, became effective on 1 September 2012.
[12] The Danish Administration of Justice Act, the legal code governing court procedure includes the formal provisions for how legal actions are to be administered and includes clauses governing mediation.
[13] Article 10.4 of the Rules on Mediation of the Danish Institute of Arbitration valid since 1 June 2015.
[14] The Conciliation Act as of 18 November 2009, entered into force on 1 January 2010, implements the Directive 2008/52/EC into Estonian law.

Finland[15]	98	no legal deadline or maximum duration
France[16]	81	three months for court-annexed mediations; two months for contractual mediations (according to CMAP[17]'s Rules[18]), unless the parties agree otherwise
Germany[19]	58	no legal deadline or maximum duration
Greece[20]	17	According to Mediation Rules, without the parties' explicit agreement the mediation proceedings may not last for more than 45 (forty five) days after the Mediator's appointment. The Mediation Coordinator may extend such duration upon the Mediator's and the parties' agreement
Hungary[21]	40	two months for court referred mediation
Ireland[22]	26	no legal deadline or maximum

[15] The Mediation Act on Court Mediation and Confirming Settlements in Courts entered into force on 21 May 2011.
[16] A general framework for mediation was established by the Act *(loi)* of 8 February 1995, amended by the Order of 16 November 2011 which transposed EU Directive 2008/52/EC into French law.
[17] The Chamber of Commerce and Industry of Paris.
[18] http://www.cmap.fr/wp-content/uploads/2016/02/mediation-rules.pdf.
[19] The Mediation Act (*Mediationsgesetz*), Article 1 of the Act to promote mediation and other procedures for out-of-court dispute settlement of 21 July 2012, published: *Bundesgesetzblatt I*¸ p. 1577, entered into force on 26 July 2012.
[20] The Mediation Act (Article 178-206 of Law 4512/2018 published 17/1/2018).
[21] Act No LV of 2002 on Mediation.

		duration
Latvia[23]	55	According to Mediation Rules of the Latvian Chamber of Commerce and Industry[24], the mediation process cannot be longer than three months, unless the Parties have agreed otherwise
Lithuania[25]	6	no legal deadline or maximum duration
Luxembourg[26]	31	The mediation procedure may not exceed three months from the signing of the agreement to mediate. However, it may be extended with the parties'' mutual consent
Malta[27]	400	no legal deadline or maximum duration
The Netherlands[28]	53	no legal deadline or maximum duration

[22] Mediation Bill 2012 (Draft Bill), approved in March 2012.
[23] There is no separate act regulating mediation. Latvia implemented the Directive 2008/52/EC by making amendments to already existing Latvian laws.
[24] Mediation Rules of the Latvian Chamber of Commerce and Industry approved 11 September 2011.
[25] The Law on Conciliatory Mediation in Civil Disputes as of 15 July 2008 No X-1702 (Version of 1 January 2019 is used currently) transposed the Directive 2008/52/EC into Lithuanian law.
[26] The Act of 24 February 2012 creates a national legislative framework for mediation in civil and criminal matters by adding a new title to the New Code of Civil Procedure. The Act transposes Directive 2008/52/EC.
[27] The Mediation Act as of 21 Decembre 2004 (Chapter 474 of the Laws of Malta). The amending Act came into force on 14 January 2011 by L.N. 10/2011.
[28] Parliamentary Proceedings II 2012/3, 33 723.

Poland[29]	39	three month maximum period starting 1 January 2016, one month before that
Portugal[30]	40	The duration of the mediation procedure is set in the agreement to mediate. The period may however be changed during the procedure upon agreement of the parties
Romania[31]	19	maximum three months in case a judicial action is suspended
Slovakia[32]	44	no legal deadline or maximum duration
Slovenia[33]	97	no legal deadline or maximum duration
Spain[34]	55	no legal deadline or maximum duration
Sweden[35]	30	no legal deadline or maximum

[29] Every legal field has its own acts and codes which contain particular regulations about the mediation procedure, including Act of 17 November 1964 Code of Civil Procedure and the Act of 23 April 1964 Civil Code. Act of 10 September 2015 (valid starting 1 January 2016) introduced a number of changes to the Polish Code of Civil Procedure.

[30] The Mediation Law No. 29/2013 as of 20 April 2013.

[31] The Mediation Law 192/2006 was published in the Romanian Official Journal on 22 May 2006.

[32] The Mediation Act No. 420/2004 with further changes and amendments.

[33] The Act on Alternative Dispute Resolution in Judicial Matters (ZARSS, *Uradni List RS* (UL RS; Official Gazette of the Republic of Slovenia) No 97/09 and 40/12 – Fiscal Balance Act (ZUJF)), adopted on 19 November 2009, came into force on 15 June 2010. The Mediation in Civil and Commercial Matters Act (ZMCGZ, UL RS No 56/08) as of 23 May 2008, published on 6 June 2008, and entered into force on 21 June 2008, transposed the provisions of the Directive 2008/52/EC into Slovenian law.

[34] Real Decreto - ley 5/2012 on mediation in civil and commercial matters, dated 5 March 2012, transferred the Directive 2008/52/EC into Spanish law. This Royal Decree was updated by Law 5/2012 dated 6 July 2012, which became effective on 28 July 2012.

		duration
United Kingdom[36]	22	no legal deadline or maximum duration

As we can see, not all countries state the maximum mediation duration, mainly such limits are defined by the legislation of countries with mandatory/court-annexed mediation. Even in cases where the maximum duration is defined, most countries allow parties to extend such term.

2.3. Duration of mediation in Italy

Italian Mediation Law (*Mediazione civile*, 2010a) establishes the maximum duration of mediation in Italy. According to Article 6 of the Mediation Law, the maximum duration is three months (four months before the Legislative Decree No 69/2013 was approved on 9 August 2013). The same term is stated by the Mediation Rules used by each mediator to run a procedure, *e.g.*, Mediation Rules of ADR Center SrL, registered by the Ministry of Justice as No. 1 in the Register of organizations permitted to provide mediation services[37]. Thus, according to the Mediation Law, the mediation procedure should be terminated within this period. Although the Mediation Law does not foresee the possibility to extend the maximum term, Mediation Rules do it. For instance, the mentioned above Mediation Rules of ADR Center SrL. state that the mediation is terminated if "90 days has passed since the request for Mediation or the date the court invitation to mediate was filed, unless ADR Center and the parties agreed otherwise".

According to the Mediation study (De Palo et al., 2014b), the average duration of mediation in Italy is 85 days (within the maximum term defined by the Law). However, we should also consider the average duration calculated by the Ministry of Justice of Italy. According to the 2018 report (Ministero della Giustizia, 2019), the following are

[35] The Act on Mediation in Certain Civil and Commercial Disputes as of 16 June 2011 entered in force on 1 August 2011, transferred the Directive 2008/52/EC into Swedish law.
[36] The Civil Procedure Act of 1997, c. 12, introduced the Civil Procedure Rules, which were intended to enable courts to deal with cases justly, manage cases actively, and require parties to help the courts do so while encouraging the use of ADR.
[37] https://www.adrcenter.it/en/mediazione/regolamento-mediazione/

average durations of the mediation in settled cases (*i.e.*, where the mediation agreement is achieved):

Year	Average duration
2014	83
2015	103
2016	115
2017	129
2018	142
2019[38]	141

Based on this data we still cannot consider the duration of the mediation procedure as the proxy of its successful outcome; however, these numbers slightly confirm our intuition that the mediation duration should be connected with the possibility to reach a mediation agreement.

3. Data Description

3.1. Sample and Source

This analysis is done based on the same data used for Chapter 2 above, provided by four Chambers of Commerce of Italy (of cities of Crotone[39], Pisa[40], Turin[41], and

[38] Data as of 30 June 2019.
[39] Servizio di Conciliazione della Camera di Commercio di Crotone è iscritto al n. 25 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010.
[40] Lo Sportello di Conciliazione della Camera di Commercio I.A.A. di Pisa è iscritto al n. 13 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010.
[41] Servizio di Conciliazione della Camera di Commercio di Torino è iscritto al n. 122 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010, cancellato dal Registro il 8/11/2017.

Verona[42]). The dataset covers the period of 2011 – 2017. The sample includes data about all the cases that were considered by these four mediation organisations during the indicated period.

The sample includes 5,305 cases, 12 of which are excluded as they were not concluded at the moment the data was provided; thus, we have no information about their duration. The data collected includes mostly the characteristics of cases (*i.e.*, the merit of the case, number and characteristics of parties involved) and procedure (*i.e.*, mandatory/voluntary, participation of the advocates), not covering the characteristics of the mediator, apart from the name of the institution and province where it is located.

Appendix 1 provides the summary statistics for 5,305 cases. For the purposes of this paper, we analyse all the "closed" cases including those that were ignored by the mediator, as only 3,526 cases have some outcome, positive – in case the parties come into agreement as the result of mediation and negative – in case mediation does not lead to an agreement between parties. The remaining 1,779 cases we include to those failing. The data demonstrate that the majority of cases under analysis have a negative outcome (about 80% of cases), *i.e.*, the success rate is approx. 20%[43].

It is important to acknowledge that we have a potential problem with selection bias. We succeed in obtaining data only from four Chambers of Commerce that covers only the tiny portion of all mediation in Italy, which includes hundreds of private mediators and mediation institutions[44]. The analysis could be biased in terms of its reliance on detection of determinants of mediation duration. We do not possess data about what is left outside the sample we have and we cannot predict anything about that data. However, as we use all and every case we were provided, we assume that the mediation practice is similar in other Chambers/ Institutions. Still, the results of this study cannot be adapted without some level of caution to the mediations that remain unanalysed.

[42] Lo Sportello di Conciliazione della CCIAA di Verona è iscritto al n. 42 del Registro degli Organismi di Mediazione tenuto dal Ministero della Giustizia e gestisce le procedure di mediazione previste dal D.Lgs. 28/2010.

[43] We emphasise again that the success rate calculated for this paper purposes differs from the success rate used by the Ministry of Justice of Italy when making statistic reports on mediation.

[44] Currently, there are more than 500 mediation institutions are registered with the Ministry of Justice of Italy (594 as of 30 June 2019). Please refer to https://mediazione.giustizia.it/rom/alboorganismimediazione.aspx for more details.

3.2. Duration of Mediation

The unit of this study is a mediation case; the duration is measured in days from the day of cases applying to the day of making a mediation agreement or decision to go forward for litigation/ other types of dispute resolution. Duration is calculated as the difference between the day of applying (depositing the request to mediate) and the day of closing the case. Due to the fact that the duration is measured in calendar days, there could be some issues with the calculation. For instance, the dataset includes three cases where the duration equals zero-days because the case was deposited and closed the same day. At the same time, there may be some overestimations as we include the nonworking days (weekends, holidays) and possible delays provoked by both parties and Chambers of Commerce as the days of duration. The issue is that in some cases such delays and nonworking day could be and some cases could be resolved smoothly with the containing the same amount of meetings, thus, the overall duration, *i.e.*, duration we have in our dataset is the different with the equal "useful" duration. Thus, the duration is the time span between two dates.

We can see in Appendix 1 that the mean of mediation duration is 55.30 days, the median is 44 days. There is an ample variation across the cases in the sample as the standard deviation of mediation duration is 44 days. The minimum duration is 0/1 day and the maximum duration fixed is 867 days[45], some cases lasted for more than 500 days, but these are extreme cases, as the most cases are closed within the maximum term defined by the legislation that is 90 days.

[45] The case lasted more than two years finished by making a mediation agreement.

.

Category	total	per subject: mean	min	median	max
no. of subjects	5290				
no. of records	5290	1	1	1	1
(first) entry time		0	0	0	0
(final) exit time		55.30132	1	44	867
subjects with gap	0				
time on gap if gap	0				
time at risk	292544	55.30132	1	44	867
failures	4598	.8691871	0	1	1

Figure 3.1. Structure of the Survival Variable: failure _d: Outcomenegative of cases ignored; analysis time _t: Mediation duration (days)

Figure 3.2 demonstrates the distribution of the dependent variable, *i.e.*, mediation duration, which is skewed to the right. As noted, the shortest duration is 0 and the longest amounts, outliers are 504, 574, 590 and 867 days. As only some cases had this type of longevity, we consider them as an anomaly, especially taking into consideration that such duration contradicts the Italian legislation about maximum mediation duration[46].

[46] According to Article 6 of the Law on Mediation of Italy the maximum mediation duration is three months; the duration was decreased from four to three months by Legislation Act No. 69/2013.

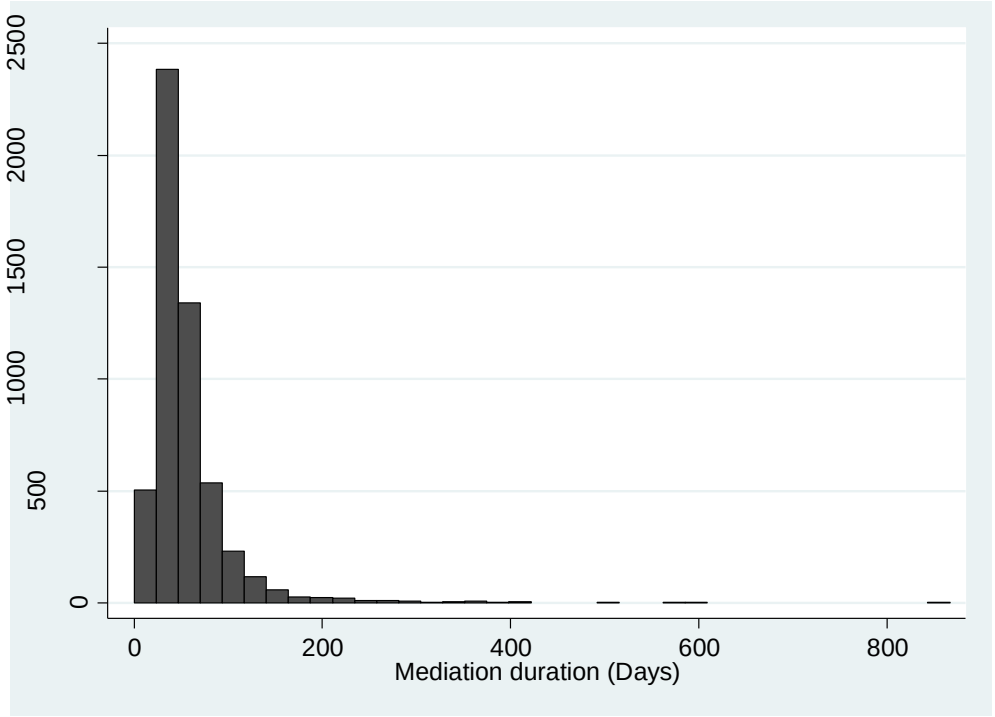

Figure 3.2. Distribution of mediation duration

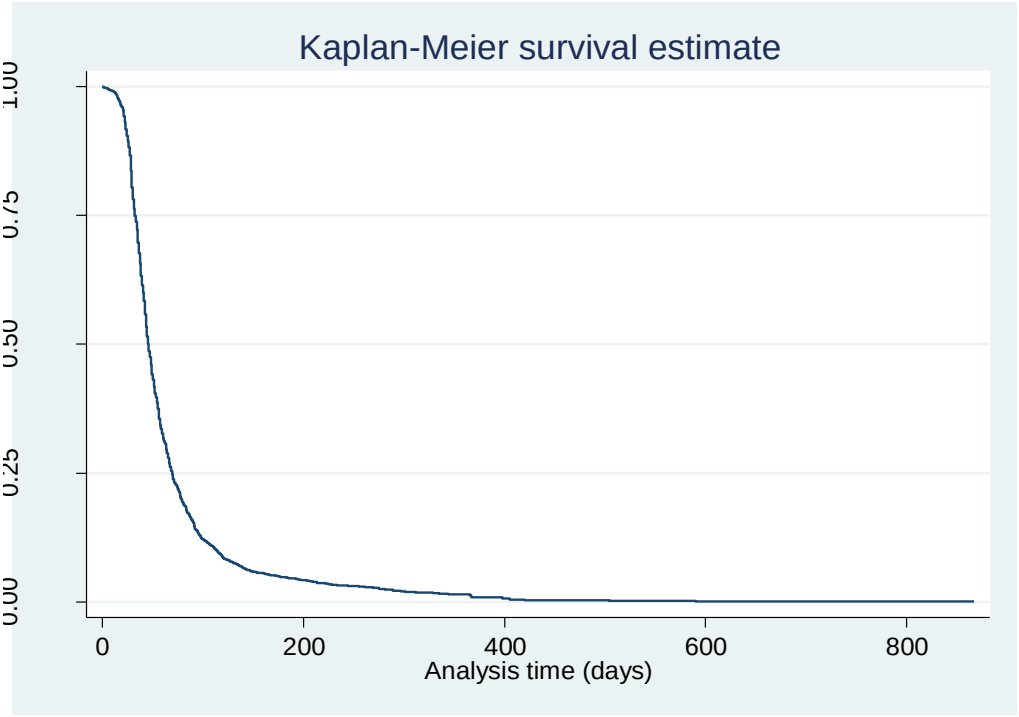

Figure 3.3. Kaplan-Meier survival estimation for all cases deposited to four Chamber of Commerce during 2011-2017

A descriptive Kaplan-Meier survival function is displayed in figure 3.3[47]. The declining magnitude of mediation duration is distinct up the 150 days approximately. After that it becomes almost a line, indicating the longevity of the mentioned cases, which lasted for years.

3.3. Determinants influencing mediation duration

The mediation duration mainly depends on the participants' willingness to mediate. Mediation is concluded when a mediation agreement is drafted (closing the dispute) or by an impossibility to make such an agreement (escalating agreement and referring to litigation). In addition, our dataset includes cases that were ignored by the mediator (please refer to para 3.1 for some more details); thus, their outcome does not depend on the parties' decision.

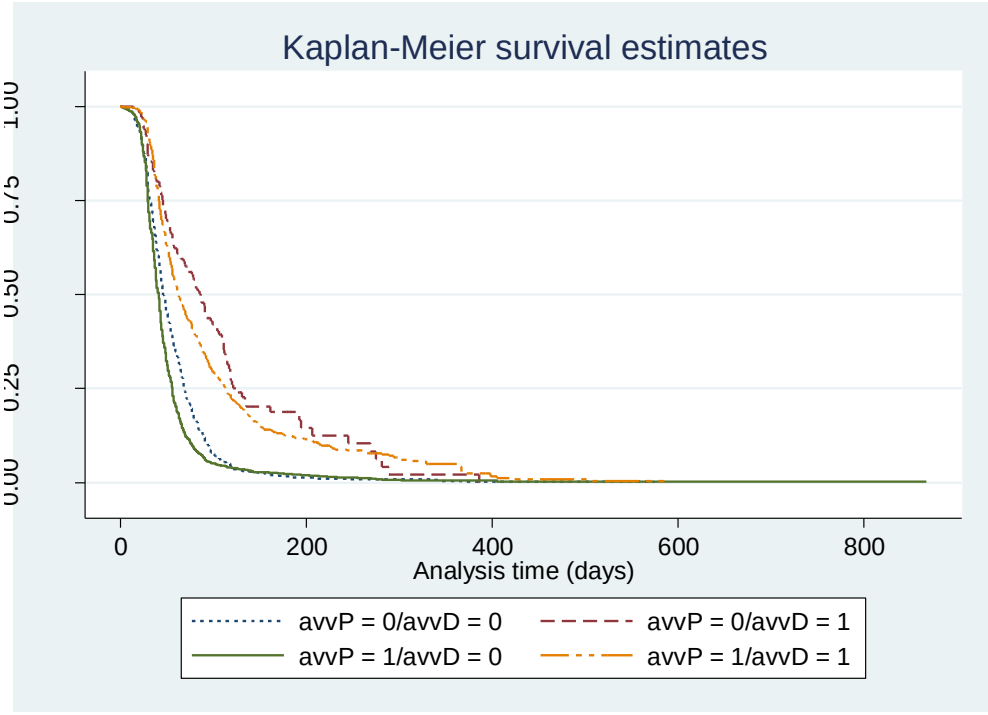

Figure 3.4. Kaplan-Meier Survival Estimates for Mediations with /without participation of Advocates on behalf of Plaintiff/Defendant

[47] The Kaplan-Meier estimation is a general survival function from the data, it measures the time until case ceases to exist.

The factors that we believe could influence the duration of the cases are those characterising the cases and parties. The case characteristics that we analyse include the price of the case (requested by the plaintiff, not adjudicated upon the procedure), nature of the procedure (mandatory or voluntary). We check the merit of the cases; however, because of the peculiarity of the dataset provided, such analysis does not give many results. We have the description of the case merit only for mandatory mediation, and the voluntary mediation (about 15% of cases) does not contain the description of the case, but just included into the group "other". Therefore, case merit is partially covered by "nature of case" variable. Such factors as the year of the procedure and the province where the cases were resolved are used as control variables.

The parties' characteristics include number of plaintiffs and defendants involved into the case, the involvement of advocates on behalf of the plaintiff/defendant (for multiple parties' cases, the parties are considered to be presented by the advocate in case at least one party has a legal representative).

As the mediation duration is mostly the demonstration of the parties' attitude to the mediation alternative, our hypothesis is that parties' characteristics have higher influence on the case duration. This paper tests this hypothesis. In particularly, the figure 3.4 plots four Kaplan-Meier survival functions – for mediations where the parties were /were not assisted by advocates.

In addition, we control the results for the moment when the mediation procedure started. The variable "Reform" that indicates whether the mediation started before or after 20 August 2013 when the mandatory mediation was reintroduced in Italy and the mandatory participation of the advocate in cases of mandatory mediation was added.

4. Empirical Analysis

4.1. Methodology

In order to explain mediation duration, we use survival analysis to examine and model the time necessary for events to occur. Initially, such event was death that explains the main terminology including the "survival" term; however, currently, this

methodology is widely used outside the area of medicine, including sociology, economics and engineering. Survival analysis is used as it allows explaining the mediation duration given different explanatory factors/variables. Although we are interested in understanding the determinants defining the survival of mediation (duration), our event of interest for the analysis purposes is a failure of mediation procedure either due "ignoring" by the mediator, or terminating of the mediation with a negative outcome, *i.e.*, without reaching the mediation agreement.

One of the most important qualities of survival analysis is the possibility of *censoring. Censoring* can be right or left. A survival data is described as right-censored in case it is not possible to observe the time of the unit of observation till the end, *i.e.*, the absence of the positive/negative outcome of mediation, whereas left-censoring is used for observations where the moment of the start of the mediation procedure is unknown (Clark et al., 2003). Our dataset contains only the concluded cases with the defined initiation date; thus, the data is complete and does contain neither left-, nor right-censored observations.

This paper uses Cox's proportional hazard model for the survival time study (Cox, 1972). The Cox model is the most commonly used multivariate approach for analysing survival time data. In the Cox's proportional hazards model, the dependent variable is the "hazard". The multivariate semi-parametric model defines the "hazard", *i.e.*, the probability of failure to have a positive outcome at a certain time as a function of different covariates that are expected to affect mediation duration. No assumption is made about the probability distribution of the hazard. However, the hazard ratio does not depend on time (Bewick et al., 2004).

In order to run the Cox proportional hazards regression, we use the hazard function *(h)* at time variable *t*, which in the present model indicates every day of mediation duration when the procedure could be failed and provided that the mediation procedure is still in place, given different factors, explanatory variables. As it was indicated in Section 3 and Appendix 1, such factors are divided into several groups including case characteristics and participant characteristics.

Thus, mathematically, the Cox model is written as

$h(t) = ho(t) \times \exp(X)$, where

$$X = \beta_1 x_1 + \beta_2 x_2 + \beta_3 x_3 + \cdots + \beta_\rho x_\rho \quad [1]$$

Where the hazard function h(t) is determined by a set of ρ covariates (x_1, x_2, …x_ρ), whose impact is measured by the size of the respective coefficient (β_1, β_2, … β_ρ). The term h_0 is the baseline hazard, it is the value if the hazard in case all explanatory variables *x* are equal to zero (*exp(0)=1*). It depends only on time *t*.

The quantities $exp(b_i)$ are called "hazard ratios". In case a value of b_i is greater than zero, or equivalently a hazard ratio is greater than one, the value of the *i*th covariate increases, the event hazard increases and so the length of survival decreases. Thus, a hazard ratio above 1 indicates a covariate that is positively associated with the event probability, and thus negatively associated with the length of survival (Bradburn et al., 2003).

In order to control the results, in addition to semi-parametric Cox hazard regression we run one of fully parametric models, Weibull distribution model and compare the results.

The following is the mathematical formulation of the Weibull distribution:

$$h_0(t) = pt^{p-1} \quad [2]$$

Weibull hazard function is the following: $h(t) = p\mu^{p-1}$

where p is the shape parameter and μ is the scalar parameter to be estimated from the data.

Among the variables used in this analysis, Price of the case and Number of parties are continuous variables while the others are categorical variables. We control for Year and Province (time and entity fixed effects) that are used as an interception. The combined fixed-effect model allows to eliminate bias from unobservable that change over time (years) but are constant over provinces, as well as it controls for factors that differ across provinces but are constant over time (Schmelzer, 2019).

4.2. Regression Results and Robustness

Our results are shown in Table 3.1, which includes the results for both Cox and Weibull distribution models. Referring to Equation 1 above, our interest is the probability to have a positive or negative hazard ration that would indicate the probability of mediation failure in a specific period of time.

As noted, we have run two regressions, *i.e.*, Cox hazard and Weibull distribution models. Both regressions are done with Year and Province interceptions (*i.e.*, fixed effects). Column 1 of Table 3.1 demonstrates the results of Cox proportional hazard model regression, and Column 2 of the Table contains the Weibull distribution regression results.

We have included parties' characteristics (number of parties and their assistance by the advocate) into the analysis. The regression results demonstrate that two of the mentioned factors have a positive impact on mediation duration[48]: *i.e.,* number of plaintiffs participating in the mediation case and participation of the advocate on behalf of the defendant. The results of both regressions are statistically significant at 1% level. The same result is confirmed by the Weibull distribution. Two other parties' characteristics prove that also the number of defendants influence positively on mediation duration, while the presence of the plaintiffs' advocate would lead to the shorter mediation duration; however, such results are not statistically significant.

As for the case's characteristics (mandatory/voluntary character) and price of the case as well as the control variable "Reform", analysis of their influence on mediation duration does not produce statistically significant results while running Cox proportional hazard regression. At that, the Weibull distribution reveals also the influence of the price of the case on the mediation duration. The result is statistically significant at 5% level. The data is close to being exponentially distributed as *p* (shape parameter) is nearly 1.

Although the levels of significance of the explanatory factors vary to some extent across the models, the direction of the hazard ratios remains constant in both models, hence the results are robust.

[48] As it was indicated above the negative hazard ratio means the higher probability of surviving (longer mediation duration).

For both models, we added interception of Year of mediation and Province (Chamber of Commerce). In addition, robust clustering errors are specified when fitting the models. Due to the data specifics, it is important not to assume that the observations within each subject are independent. Therefore, we "cluster" the province for defining standard errors for both models.

As an additional robustness check the multilevel regression was run. Such regression serves to test the nested units. As noted above, it is important not to assume the independence of the units nested within the same higher level unit, as those could have outcomes correlated with each other, hence violating the assumption of independence of observations. We talk about possible unmeasurable covariates at the Province level (*e.g.*, same mediators, same Rules of mediation etc.) that take the same value for the cases resolved within the specific province.

In order to deal with this issue, we use the Multilevel regression model that allows analysing data having a multilevel structure while accounting for the clustering of lower level units within higher level units (Austin, 2017). Specifically, we run the parametric (Weibull) frailty survival model that incorporates Year and Province random effects. In addition, an adjustment is done for the province effect in estimating the standard errors of the parameter estimates (Freedman, 2006).

The results of the Multilevel Weibull frailty survival model are provided in Table 3.2. Adding the random effects (for the Year and the Province of mediation) together with adjusting the standard errors for the province effect result in bringing most determinants to be statistically significant at 1% level. The only factor that is not statistically significant is the presence of the advocate on behalf of the plaintiff. Thus, the following factors have negative hazard ratio, *i.e.,* lead to longer mediation duration: (1) Nature of the procedure, *i.e.*, mediation lasts longer in case of a voluntary procedure; (2) Number of the participants, both plaintiffs and defendants, *i.e.*, increase in number of the participants leads to the mediation duration increase; (3) Cases where the defendant is assisted by the advocate last more; (4) Price of the case, *i.e.,* the higher is the amount requested by the Plaintiff, more time is required to deal with a dispute. Two determinants have positive hazard ratio, hence they are approaching an interest event *i.e.*, failure of the mediation procedure. These are (1) Reform, *i.e.*, cases initiated after

20 August 2013 last less – result is statistically significant at 1% level, and (2) Presence of the advocate on behalf of the plaintiff, which that is not statistically significant.

The Cumulative Hazard function is presented in Figure 3.5, the increasing Weibull curve describing the mixed-level Weibull regression.

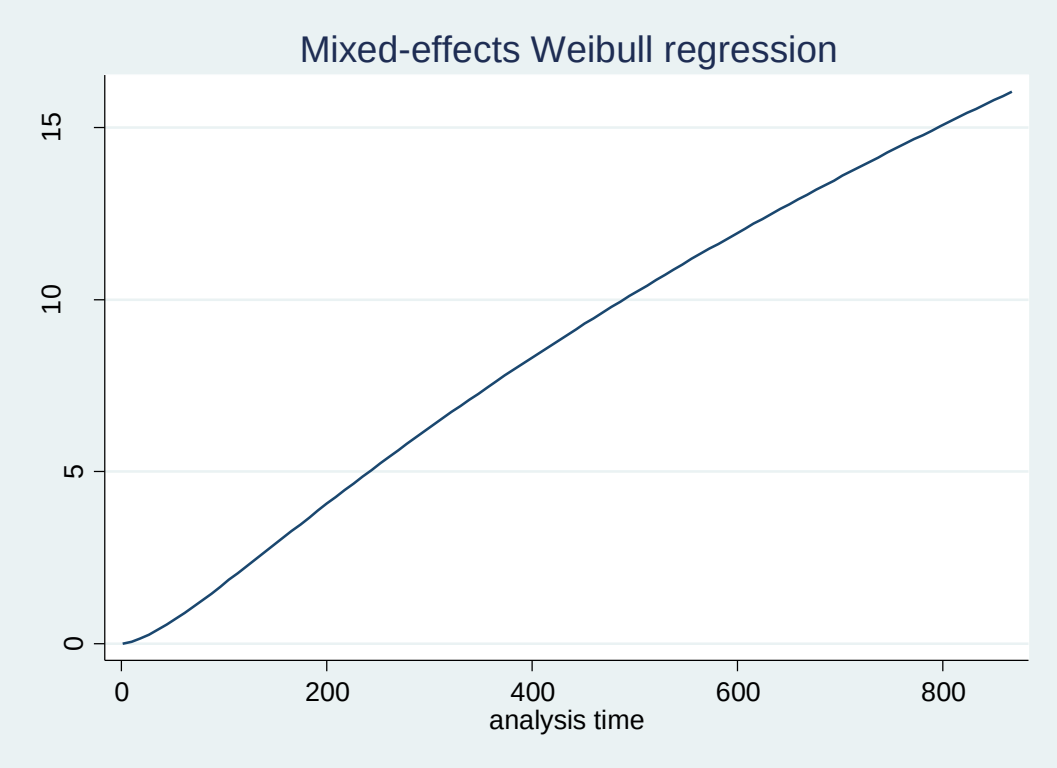

Figure 3.5 Mixed-effects Weibull Cumulative Hazard Regression

Upon running the Cox regression, we have tested the proportional hazard assumption and done the Concordance test (Harrell's C concordance statistic). Both test confirmed the goodness of the Cox proportional hazard model (Newson, 2010). In addition, the fitting test is done and compared the Akaike's information criterion / Bayesian information criterion of different models (Williams R, 2018). Based on the tests results, we defined that Cox proportional hazard regression fits better, also both models we use are suitable. Table 3.3 provides for the detailed analysis of the suggested models and their comparison that allowed taking a decision. Both models produced similar statistically significant results.

5. Discussions

Our empirical results reveal a result that gives a confirmation of our hypothesis that the parties' characteristics mainly define the mediation duration. In particular, our analysis confirmed that the number of participants and their assistance by the advocate influence the mediation duration.

The result is a little bit puzzling if we consider that the importance has the number of plaintiffs, not defendants. At that, only the defendant's advocate participation influences mediation duration. Hence, we have the importance of a qualitative characteristic of one party and a quantitative characteristic of another one.

In particular, we consider interesting the result that confirms our previous Chapter related to the advocates' role in mediation. That analysis revealed that in case the advocate represents the plaintiff, such assistance has a negative impact on mediation outcome, while the same advocate representing defendant influences positively on the mediation outcome. As now we see that mediation duration could be considered as a proxy of the intention to mediate, and indirectly as the success of mediation, our result that presence of the advocate on behalf of the defendant determines the mediation duration, indirectly confirms also our previous result, *i.e.*, advocate's presence on behalf of defendant leads to mediation success.

As for plaintiffs' advocates, our result is not statistically significant but has the same sign as the previous analysis, plaintiffs' advocates do not like mediation, their presences have a negative impact on both mediation duration and outcome.

A little bit surprising result is the absence of any influence of the nature of the procedure on the duration. We would expect that in case of voluntary mediation, the parties are more prepared and ready to mediate. However, such a result (negative hazard ratio, but not statistically significant) could be explained by the fact that more prepared parties resolve their disputes faster; thus, the mediation duration result is lower.

For our research, we utilised different methodologies of survival analysis that produced the compatible results, slightly different in level of significance, but having the same parameter vector direction.

Our research covered the periods before and after the introduction of mandatory mediation and mandatory presence of advocates. We have controlled our results for the "Reform" variable that covers this particular moment. Our results remain stable and do not depend on legislation change in case. Thus, we conclude that the factor that defines the influence of the advocate presence on the mediation duration is covered by the advocate's role characteristics (as they were described in Chapter 2 above).

6. Conclusions

This paper provides evidence that mediation duration can be used as a proxy of mediation success, not only the parties' attitude to the procedure. It demonstrates that mainly the parties' characteristics; as such their attitude defines the longitude of the procedure. Beyond the scholarly interest, such results have also straightforward policy implications. As it is indicated in section 2, Italian legislation defines the maximum duration of the mediation. However, the paper demonstrates that often more time is required to reach an agreement than to refuse it. Therefore, we believe that on the legislation level should be defined the maximum duration of the mandatory mediation, court-annexed mediation, *i.e.*, mediation referred by the judge in Italy (in order to facilitate the judges activity) as in such a way the legislation ensures that mediation does not create additional delay in dispute resolution. However, in case of voluntary mediation, such issue as the mediation duration should be decided by the parties among other things, while making an agreement to mediate.

References

Akaike, H., 1974. A new look at the statistical model identification. IEEE Trans. Automat. Contr. 19, 716–723. https://doi.org/10.1109/TAC.1974.1100705

Austin, P.C., 2017. A Tutorial on Multilevel Survival Analysis: Methods, Models and Applications: Multilevel Survival Analysis. International Statistical Review 85, 185–203. https://doi.org/10.1111/insr.12214

Bewick, V., Cheek, L., Ball, J., 2004. Statistics review 12: Survival analysis. Crit Care 8, 389–394. https://doi.org/10.1186/cc2955

Bradburn, M.J., Clark, T.G., Love, S.B., Altman, D.G., 2003a. Survival analysis part II: multivariate data analysis--an introduction to concepts and methods. Br. J. Cancer 89, 431–436. https://doi.org/10.1038/sj.bjc.6601119

Bradburn, M.J., Clark, T.G., Love, S.B., Altman, D.G., 2003b. Survival analysis Part III: multivariate data analysis -- choosing a model and assessing its adequacy and fit. Br. J. Cancer 89, 605–611. https://doi.org/10.1038/sj.bjc.6601120

Clark, T.G., Bradburn, M.J., Love, S.B., Altman, D.G., 2003a. Survival Analysis Part I: Basic concepts and first analyses. Br J Cancer 89, 232–238. https://doi.org/10.1038/sj.bjc.6601118

Clark, T.G., Bradburn, M.J., Love, S.B., Altman, D.G., 2003b. Survival analysis part IV: further concepts and methods in survival analysis. Br. J. Cancer 89, 781–786. https://doi.org/10.1038/sj.bjc.6601117

Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

Council of Europe, European Commission for the Efficiency of Justice, 2019a. European Handbook for Mediation Lawmaking. Strasbourg.

Council of Europe, European Commission for the Efficiency of Justice, 2019b. Guidelines on Designing and Monitoring Mediation Training Schemes.

Council of Europe, European Commission for the Efficiency of Justice, 2018. European judicial systems: efficiency and quality of justice, 2018 Edition (2016 data), CEPEJ Studies.

Cox, D.R., 1972. Regression Models and Life-Tables. Journal of the Royal Statistical Society. Series B (Methodological) 34, 187–220.

Crowther, M.J., Abrams, K.R., Lambert, P.C., 2013. Joint Modeling of Longitudinal and Survival Data. The Stata Journal 13, 165–184. https://doi.org/10.1177/1536867X1301300112

Crumer, A.M., n.d. Comparison Between Weibull and Cox Proportional Hazards Model 34.

De Palo, G., n.d. Constantin Adi Gavrila | Opt-out mediation model cuts real estate litigation in Italy by almost 50%. URL https://www.adigavrila.com/blog/opt-out-mediation-model-cuts-real-estate-litigation-in-italy-by-almost-50/ (accessed 10.26.19).

De Palo, G., D'Urso, L., Trevor, M.B., European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 2014. "Rebooting" the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU : study. EUR-OP, Luxembourg.

De Palo, G., Hamline, M., European Parliament, Directorate-General for Internal Policies of the Union, 2018. A ten-year-long "EU mediation paradox": when an EU directive needs to be more ...directive.

DECRETO LEGISLATIVO No. 28 in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali., 2010.
D'Urso, L., 2019. Più crescita e occupazione se la giustizia è rapida (anche grazie alla mediazione). Mondo ADR - Conflict Management e Risoluzione delle Controversie. URL http://www.mondoadr.it/articoli/piu-crescita-e-occupazione-se-la-giustizia-e-rapida.html (accessed 10.21.19).
Epstein, B., Sobel, M., 1953. Life Testing. Journal of the American Statistical Association 48, 486–502.
Ervasti, K., 2018. Past, Present and Future of Mediation in Nordic Countries, in: Nylund, A., Ervasti, K., Adrian, L. (Eds.), Nordic Mediation Research. Springer International Publishing, Cham, pp. 225–245. https://doi.org/10.1007/978-3-319-73019-6_12
European e-Justice Portal - Mediation in Member States [WWW Document], n.d. URL https://e-justice.europa.eu/content_mediation_in_member_states-64-en.do (accessed 10.23.19).
European Parliament, COUNCIL OF THE EUROPEAN UNION, 2008. Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
Freedman, D.A., 2006. On The So-Called "Huber Sandwich Estimator" and "Robust Standard Errors." The American Statistician 60, 299–302. https://doi.org/10.1198/000313006X152207
George, B., Seals, S., Aban, I., 2014. Survival analysis and regression models. J Nucl Cardiol 21, 686–694. https://doi.org/10.1007/s12350-014-9908-2
Goel, M.K., Khanna, P., Kishore, J., 2010. Understanding survival analysis: Kaplan-Meier estimate. Int J Ayurveda Res 1, 274–278. https://doi.org/10.4103/0974-7788.76794
Greene, W., 2002. The Bias of the Fixed Effects Estimator in Nonlinear Models 31.
Johnson, S., McMillan, J., 2002. Courts and Relational Contracts. Journal of Law, Economics, and Organization 18, 221–277.
La Porta, R., Lopez-de-Silanes, F., Shleifer, A., Vishny, R.W., 1998. Law and Finance. Journal of Political Economy 106, 1113–1155. https://doi.org/10.1086/250042
Lawless, J.F., 2003. Statistical models and methods for lifetime data, 2nd ed. ed, Wiley series in probability and statistics. Wiley-Interscience, Hoboken, N.J.
Lunn, M., McNeil, D., 1995. Applying Cox Regression to Competing Risks. Biometrics 51, 524–532. https://doi.org/10.2307/2532940
Marotta, G.G., 2019. LE STATISTICHE UFFICIALI SULLA MEDIAZIONE CIVILE PER IL 2018. Diritto24 il sole 24 ore.
Ministero della Giustizia, 2019a. MEDIAZIONE CIVILE EX D.L. 28/2010 STATISTICHE DEL 2018.
Ministero della Giustizia, 2019b. MEDIAZIONE CIVILE EX D.L. 28/2010 STATISTICHE DEL 2019 PERIODO 1 GENNAIO – 30 GIUGNO.
Newson, R.B., 2010. Comparing the predictive powers of survival models using Harrell's C or Somers' D. The Stata Journal: Promoting communications on statistics and Stata 10, 339–358.
Nordic mediation research, 1st edition. ed, 2018. . Springer Berlin Heidelberg, New York, NY.
Padrini, F., Guerrera, D., Malvolti, D., 2009. LA CONGESTIONE DELLA GIUSTIZIA CIVILE IN ITALIA: CAUSE ED IMPLICAZIONI PER IL

SISTEMA ECONOMICO. Note Tematiche del Ministero dell'Economia e delle Finanze 8, 1–28.
Pezone, V., 2018. The Real Effects of Judicial Enforcement: Evidence from Italy. SSRN Journal 192, 66. https://doi.org/10.2139/ssrn.3090884
Raftery, A.E., 1995. Bayesian Model Selection in Social Research. Sociological Methodology 25, 111–163. https://doi.org/10.2307/271063
Rajan, R.G., Zingales, L., 1998. Financial Dependence and Growth. The American Economic Review 88, 559–586.
Schmelzer, C.H., Martin Arnold, Alexander Gerber and Martin, 2019. Introduction to Econometrics with R. Essen, Germany.
Schober, P., Vetter, T.R., 2018. Survival Analysis and Interpretation of Time-to-Event Data: The Tortoise and the Hare. Anesth Analg 127, 792–798. https://doi.org/10.1213/ANE.0000000000003653
Senato della Republica, 1947. Constitution of the Italian Republic.
Tribunale di Firenze, 2018. Giustizia 4.0 - documento di approfondimento della soluzione.
Williams, R., 2019. Scalar Measures of Fit: Pseudo R2 and Information Measures (AIC & BIC) 16.
World Bank (Ed.), 2019. DOING BUSINESS 2019.
Yin, G., 2007. Model checking for additive hazards model with multivariate survival data. Journal of Multivariate Analysis 98, 1018–1032. https://doi.org/10.1016/j.jmva.2006.02.005
Zhang, Z., 2016. Parametric regression model for survival data: Weibull regression model as an example. Ann Transl Med 4. https://doi.org/10.21037/atm.2016.08.45

Table 3.1. Results of Cox PH and Weibull regressions

VARIABLES	Cox PH	Weibull distribution _t	ln_p
Nature of the procedure	-0.0164	-0.117	
	(0.0977)	(0.163)	
Num of Plaintiffs	-0.0371***	-0.0630***	
	(0.00836)	(0.00440)	
Num of Defendents	-0.0433	-0.0406	
	(0.0310)	(0.0384)	
Plaintiff's Advocate	0.0858	0.0223	
	(0.0570)	(0.0291)	
Defendant's Advocate	-0.845***	-0.956***	
	(0.112)	(0.138)	
Price of the case	0.00664	-0.0145**	
	(0.0106)	(0.00728)	
Reform	0.0366	0.00229	
	(0.243)	(0.168)	
2.province	0.507***	0.226	
	(0.139)	(0.188)	
3.province	-0.156***	0.00634	
	(0.0606)	(0.0347)	
4.province	-0.0470	-0.0122	
	(0.0840)	(0.0936)	
2012.anno_procedimento	0.0991	-0.227	
	(0.162)	(0.259)	
2013.anno_procedimento	0.612***	0.349	
	(0.197)	(0.234)	
2014.anno_procedimento	0.552**	0.163	
	(0.224)	(0.175)	
2015.anno_procedimento	0.391*	0.104	
	(0.217)	(0.162)	
2016.anno_procedimento	0.323	0.0919	
	(0.218)	(0.164)	
2017.anno_procedimento	0.325	0.137	
	(0.342)	(0.266)	
Constant		-6.178***	0.463***
		(0.436)	(0.0810)
Observations	5,188	5,188	5,188

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 3.2. Multilevel Mixed Effect Survival Model (Weibull distribution)

	(1)	(2)	(3)	(4)
VARIABLES	_t	ln_p	var(_cons[Year of mediation])	var(_cons[Year of mediation >province])
Nature of the procedure	-0.0985***			
	(0.00305)			
Num of Plaintiffs	-0.0633***			
	(0.00286)			
Num of Defendants	-0.0356***			
	(0.000278)			
Plaintiff's Advocate	0.00124			
	(0.000780)			
Defendant's Advocate	-0.994***			
	(0.00198)			
Price of the case	-0.0162***			
	(0.00281)			
Reform	0.383***			
	(0.00374)			
Constant	-6.441***	0.473***	0.0872***	0.190***
	(0.0292)	(2.26e-07)	(0.0218)	(0.0181)
Observations	5,188	5,188	5,188	5,188
Number of groups	7	7	7	7

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Table 3.3. Models comparison

Akaike's information criterion and Bayesian information criterion test

Model	Obs	ll(null)	ll(model)	df	AIC	BIC
Cox PH	5,188	-34717.89	-34268.32	3	68542.63	68562.29
Weibull distribution	5,188	-5578.212	-5127.916	3	10261.83	10281.49

The model with the smaller BIC is preferred, *i.e.* if BIC1 – BIC2 < 0, model 1 is preferred. If BIC1 – BIC2 > 0, the second model is preferred.

There is proposed the following guidelines for magnitude of BIC difference (Raftery, 1995):

Absolute difference	Evidence
0-2	Weak
2-6	Positive
6-10	Strong
>10	Very Strong

Appendix 1. Summary statistics for Chapter 2 and Chapter 3

		e(count)	e (sum_w)	e(mean)	e(Var)	e(sd)	e(min)	e(max)	e(sum)
Outcome	Outcome	3,526	3,526	.19654	.1579568	.3974378	0	1	693
Plaintiff's advocate	AvvP	5,305	5,305	.6708765	.2208428	.4699392	0	1	3,559
Defendant's advocate	AvvD	5,305	5,305	.2518379	.1884511	.4341095	0	1	1,336
Price of the case	PoC	5,209	5,209	9.928982	3.48566	1.866992	0	17.72753	51,720.07
Reform	Ref	5,305	5,305	.6972667	.2111256	.4594841	0	1	3,699
Duration of the mediation	Dur	5,293	5,293	55.26998	1,948.019	44.13637	0	867	292,544
Nature of the procedure	Nat	5,305	5,305	.1479736	.1261012	.3551073	0	1	785
Number of Plaintiffs	NumP	5,297	5,297	1.320181	2.275108	1.508346	1	73	6,993
Number of Defendants	NumD	5,293	5,293	1.567542	3.081085	1.755302	0	39	8,297

	Count	Mean	Sd	Min	Max
Outcome	3,526	.19654	.3974378	0	1
Plaintiff's advocate	5,305	.6708765	.4699392	0	1
Defendant's advocate	5,305	.2518379	.4341095	0	1
Price of the case	5,209	9.928982	1.866992	0	17.72753
Reform	5,305	.6972667	.4594841	0	1
Duration of the mediation	5,293	55.26998	44.13637	0	867
Nature of the procedure	5,305	.1479736	.3551073	0	1
Number of Plaintiffs	5,297	1.320181	1.508346	1	73
Number of Defendants	5,293	1.567542	1.755302	0	39
N	5,305				