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Conciliation in labour disputes between problems of effectiveness of workers' rights and prospects for the future in the Italian civil procedure system

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Abstract: The purpose of this paper is not only to provide a clear and concise timeline of the key developments that conciliation in labour disputes has witnessed over time (starting from the mini-reform of Legislative Decree No 80/1998, the 2001 Foglia Commission, the 2002 Vaccarella Commission, Law No 183/2010, the 2012 Fornero Reform and the Jobs Act 2015) but also to examine the critical issues that have surfaced in relation to the legislation passed in the matter, especially with reference to the issue of the effectiveness of workers' rights. The study has concluded that the use of conciliation in litigation can be a valid tool capable of amicably resolving a legal dispute, alleviating the workload of the courts and facilitating early resolution through alternative paths. Conciliation, like arbitration, can be viewed as a mechanism that offers a possible way out of the gridlock in labour law litigation and the huge backlog of cases before the courts in order to provide citizens with *effective* justice. That said, recourse to conciliation in Italy is very limited in practice owing to a series of reasons at various levels that serve to discourage any interest in it. This paper has sought to identify those obstacles as objectively as possible, bearing in mind however that recourse to alternatives to the courts does not appear to be an integral part of the Italian legal tradition. The final part of this paper outlines what future developments might look like, specifically in the direction of negotiations along the lines of the US model.

Keywords: Conciliation – Labour - Effectiveness of workers' rights – Italian civil procedure system

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1. FOREWORD

The task of defining conciliation[1] as that term is understood in the realm of labour disputes is somewhat complicated, not least because of the many twists and turns that have characterised its development. Indeed, conciliation has had a somewhat chequered history, veering between periods when it was mandatory and others when it was merely optional. Nonetheless, some general points can be made regarding the notion as a whole. It is a mechanism that falls within the scope of what is commonly referred to as ADR, i.e. a means to resolve disputes other than through recourse to a court of law. There are various types of conciliation, depending above all on the forum, which may be judicial, administrative or trade union in nature, and on the body that presides over it, be it a multi-member or single-member one. In this regard, the function of conciliation may differ by virtue of the specific characteristics that it exhibits, for example, proactive, mediative or voluntary, as may the regulation of the degree of formality involved linked also to whether or not the process serves as a preliminary step to instituting judicial or arbitral proceedings[2]. Indeed, the current legal system increasingly sees conciliation as a pre-trial tool to amicably settle an existing legal dispute pending before the courts and consequently to alleviate the workload of the latter.

As will be discussed in greater detail below, standard forms of conciliation like that used in the resolution of disputes in the corporate field, introduced by Legislative Decree No 5/2003[3], have also come to be regulated by law.

Mandatory out-of-court mediation was introduced by Legislative Decree No 28/2010. And, more relevant to the topic at hand, Law No 92/2012 once again made an attempt at conciliation in labour disputes mandatory, albeit limited to instances of

1 "[W]hen we speak of conciliation we are alluding to a multifaceted phenomenon that can take on different forms depending on the context in which the expression is used and the associated regulatory framework": G. Ferraro, *La conciliazione nelle controversie di lavoro*, in A. Vallebona (ed), *Il diritto procedurale del lavoro, Trattato di diritto del lavoro, diretto da Mattia Persiani e Franco Carinci*, IX, 2011, Padua, 2011.

2 F. P. Luiso, *La conciliazione nel quadro della tutela dei diritti*, in *Rivista trimestrale di diritto e procedura civile,* 2004, but also F. Lancellotti, *Conciliazione delle parti*, in *Enc. Dir.*, Vol. VIII, Milan, 1961.

3 G. Alpa and T. Galletto, *Processo, arbitrato e conciliazione nelle controversie societarie, bancarie e del mercato finanziario*, Milan, 2004.

individual dismissals on business grounds. However, in that latter case the subsequent Legislative Decree No 23 of 7 March 2015 excluded the applicability of that form of conciliation for employment contracts signed after its entry into force, providing instead for a form, or better an *offer*, of conciliation that the 2015 legislation itself (Article 6) introduces, as always with regard only to "new hires", making it highly attractive owing to the tax and social security advantages that it confers[4].

The purpose of this paper is not only to provide a clear and concise timeline of the key developments that conciliation in labour disputes has witnessed over the years but also to examine the critical issues that have surfaced in relation to the legislation passed in the matter (especially with reference to the issue of the effectiveness of workers' rights), with an eye to the future and a meaningful use of conciliation in labour disputes.

2. ORIGIN AND INITIAL DEVELOPMENT OF CONCILIATION IN LABOUR DISPUTES

Labour law has always demonstrated an openness to forms of alternative dispute resolution that eschew courts of law. One only has to think of the historical board of arbiters experience of the late 19th century[5], the first example of conciliation established by Law No 295 of 15 June 1893 but subsequently abolished by Royal Decree No 471 of 26 February 1928. Years later, the Civil Procedure Code of 1942, enacted under a corporative system in which trade unions legally represented all categories of employers and employees, prescribed that reporting disputes to the unions and attempting to resolve them through conciliation under the auspices of the trade unions themselves were prerequisites for bringing legal action before the courts (Article 410 of the Civil Procedure Code). With the fall of corporatism, the rule in question was superseded and replaced by an interpretation based on case law and scholarly opinion that downplayed an attempt at conciliation, envisaged as mandatory under numerous collective bargaining agreements and contracts, and treated it as a merely optional step.

The topic of conciliation surfaced in subsequent laws that preceded the major 1973 reform, more about which below. For example, Article 7 of Law No 604/1966 governing dismissals provided for an attempt at conciliation at provincial labour offices alongside that undertaken in accordance with trade union procedures. And again in Law No 300/1970 (known as the 'Workers' Statute"), where conciliation functions are vested in

4 The tax advantages are for both parties (especially for the employee but also for the employer, who at the same cost to the business can offer the employee a higher net sum thus facilitating a settlement of the dispute) and likewise the social security advantages (especially for the employer but only with respect to avoiding reinstatement because the compensation for unfair dismissal is already exempt from social security contributions).

5 Cf. P. Passaniti, *Storia del diritto del lavoro. I. La questione del contratto di lavoro nell'Italia liberale (1865-1920)*, 2006, 369.

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provincial and regional labour offices, with reference to disputes concerning individual dismissals and those arising from the imposition of disciplinary sanctions.

Conciliation underwent significant changes on foot of Law No 533 of 11 August 1973 on "Regulation of individual labour disputes and disputes concerning mandatory social assistance and social security"[6], such that one can rightly speak of a "new era" of conciliation in labour disputes[7]. The reform sought to introduce alternative forms of settling individual labour disputes, managing to blend conciliation with judicial protection[8]. Indeed, by replacing the entire Title IV of Book Two of the Civil Procedure Code, Law No 533/1973 afforded parties the opportunity to settle their differences through alternative forms of dispute resolution, such as conciliation for individual labour disputes concerning the employment relationships specified in Article 409 of the Civil Procedure Code[9]. The main changes that Law No 533/1973 introduced included: legal proceedings could be commenced by an application rather than a writ of summons as prescribed by the Civil Procedure Code; the strengthening of the parties' obligation to clearly frame the claims, defences and supporting evidence right from the very beginning; an emphasis on oral hearings concentrated over a short period of time; and encouraging conciliation as a means of resolving disputes. Through its reform of labour law disputes, parliament had adopted a precise stance, namely, leaving it up employers and employees to choose between availing themselves of conciliation or suing before the courts[10].

Finally, in 1990, Article 5 of Law No 108/1990 made attempting to resolve disputes through conciliation mandatory for challenges to individual dismissals entailing a remedy in damages whereas it did not address challenges entailing reinstatement[11]. Attempting administrative conciliation or conciliation under the auspices of trade unions was made a prerequisite to bringing legal action before the courts, failing which the judicial proceedings would be stayed and the parties given a non-extendable deadline to

6 Fifty years after the changes in question, see the comments of G. Fontana, *Che fine ha fatto il processo del lavoro? Riflessioni dopo 'i primi 50 anni' della legge n. 533/1973*, in *Riv. Giur. Lav*., 2023, 1, 27. See also A. Vallebona, *I requisiti essenziali del processo del lavoro*, in *Mass. Giur. Lav.*, 2022, 4, 889.

7 For the innovative aspects of that regulatory framework, see M. Dell'Olio, I. Piccinini and P. Ferrari, *La tutela dei diritti nel processo del lavoro*, Turin, 1994.

8 On this point see F. P. Luiso, *Il tentativo obbligatorio di conciliazione nelle controversie di lavoro*, in *Riv. it. Dir. lav.*, 1999, 4, 375.

9 Article 410 - Optional Attempt at Conciliation: "Any person who intends to file a lawsuit relating to the relationships specified in Article 409 of the Code of Civil Procedure and who does not wish to avail himself of the procedures provided for under collective bargaining agreements and contracts may, including through a trade union, attempt conciliation before the conciliation board [...]".

10 Cf. V. Amoroso, G. Di Cerbo and A. Maresca, *Le fonti del diritto italiano. Il diritto del lavoro costituzione, Codice civile e leggi speciali*, Milan, 2007.

11 On this point see A. Proto Pisani, *Note in tema di conciliazione obbligatoria e di arbitrato nella nuova disciplina dei licenziamenti individuali (art. 5 l. 11 maggio 1990, n. 108)*, in *Foro it.*, 1990, 506; C. M. Barone, *Conciliazione obbligatoria ed arbitrato*, in *Foro it*., 1990, 376; G. Pera, *Le disposizioni processuali della legge n. 108/1990 sui licenziamenti*, in *Giust. Civ.*, 1990, 2, 390.

attempt to resolve their differences through conciliation. A similar provision was introduced in 1992 with reference to labour disputes involving workers in the public sector.

For the first time since the fall of the fascist regime, conciliation was once again viewed as being a solution to legal disputes, and not as a mere form of assisted consent enabling derogation from otherwise peremptory norms of labour law[12].

3. THE MANDATORY ATTEMPT AT CONCILIATION INTRODUCED BY THE 1998 MINI-REFORM, CONSTITUTIONALITY AND DEBATE AMONG LEGAL SCHOLARS

With Legislative Decree No 80 of 1998 the legislature sought to streamline the process of resolving labour disputes by favouring early resolution and alternative paths like conciliation and arbitration. These changes were introduced both because jurisdiction over public-sector employment disputes had passed from the administrative to the ordinary courts thereby increasing the workload of the latter and because conciliation and arbitration came to be seen as tools that offered a possible way out of the gridlock in labour law litigation, linked above all to a huge backlog of cases before the courts and the ever diminishing returns of the triad "orality, concentration and speed"[13]. Article 11(4)(g) of Law No 59 of 15 March 1997 provided that in the adoption of delegated legislation the government had to implement "procedural organisational measures, including of a general nature, to prevent dysfunctions due to the backlog of litigation; out-of-court conciliation and arbitration procedures". The generalisation of a mandatory attempt at conciliation is to be seen from the perspective of a systemic regulation of labour disputes, jurisdiction over which lay with the ordinary courts[14].

In concrete terms, Legislative Decree No 80 of 30 March 1998, as amended by Legislative Decree No 387 of 29 October 1998[15] (which supplemented and partly amended Legislative Decree No 80/1998 although confirming the basic options enshrined therein), rewrote the rules for conciliation, amending Articles 410 and 412 of the Civil Procedure Code, by extending the obligation to attempt it to all disputes involving the relationships referred to in Article 409 of the Civil Procedure Code.[16] Also amended

12 See F. P. Luiso, *Il tentativo obbligatorio di conciliazione nelle controversie di lavoro*, in *Riv. it. Dir. lav*., cit.

13 Cf. S. Caruso, *Sindacato, arbitrato e conflitto collettivo*, in *Dir. Rel. Ind.*, 1992, 48.

14 Cf. M. Grandi, *La composizione stragiudiziale delle controversie di lavoro nel pubblico impiego (dlgs. 80/1998)*, in *Lav. Pub. Amm.*, 1998, 791.

15 Cf. Article 1(14) of Law No 191 of 16 June 1998, which amending Article 1(4) of Law No 59/1997 cited above, renewed the delegation of legislative authority to the government until "31 October 1998", thus enabling Legislative Decree No 387/1998 to be adopted.

16 Article 409 (Individual Labour Disputes): "The provisions of this article shall apply to disputes relating to:
1) private-sector employer-employee relationships, even if not inherent to the carrying on of a business;
2) sharecropping, metayage, agricultural profit-sharing, lease to a direct farmer, as well as relations deriving from other agricultural contracts, without prejudice to the jurisdiction of the specialised agricultural sections of the courts;

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were the rules on informal arbitration (i.e. arbitration where the arbitral award has the binding force of contract and not of a judgment) through adding Articles 412-*ter* and 412-*quater* of the Civil Procedure Code, as if to underline the continuity[17] between conciliation and arbitration.

Out of a desire to prevent dysfunctions in the administration of civil justice, the legislature tackled the entire field of labour disputes and transformed an attempt at conciliation from an optional to a mandatory step, probably rooted in the above-mentioned Article 11(1)(g) of Law No 59/1997, which envisioned the adoption of organisational and procedural measures also of a general nature aimed at preventing dysfunctions due to the backlog of litigation in the courts[18].

The new Article 410 of the Civil Procedure Code thus provided for a mandatory attempt at conciliation, to be undertaken either in an administrative or trade union setting. Mandatory in the sense that legal proceedings before the courts could not be brought without first trying conciliation, whether it proved to be successful or not. A mandatory attempt at conciliation was conceived by the law as a filter for access to the courts and to create a form of conditional judicial protection since it required recourse to non-judicial means of protection before bringing an action in court. Consistent with that conception, communication of the application for conciliation interrupted the statute of limitations and suspended the running of time for as long as the conciliation continued and for twenty days after its conclusion. Viewing an attempt at conciliation as a precondition for suing before the courts gave rise to quite a few doubts as to its constitutionality, also on the basis of previous Constitutional Court case law[19]. Essentially, the doubts centred on the possibility that the government might have exceeded the legislative powers delegated to it by parliament under Law No 59/1997 when it amended Articles 410, 410-*bis* and 412-*bis* of the Civil Procedure Code by making an

(3) agency, commercial agency and other collaborative relationships resulting in the provision of continuous and coordinated work mainly of a personal nature not constituting however an employer-employee relationship;

(4) public-sector employer-employee relationships regarding public entities carrying on exclusively or predominantly economic activities;

(5) public-sector employer-employee relationships regarding public entities and other public-sector employment relationships insofar as jurisdiction in connection therewith is not vested by law in another court.

17 Typical of labour law (both as regards legislation and contractual frameworks), where there is a special correlation between conciliation and arbitration: cf. M. Grandi, *L'arbitrato irrituale in materia di lavoro*, in *Riv. trim. dir. Proc. Civ*., 1991, 421.

18 The question arose as to whether the parent statute passed by parliament – given its subject matter – allowed the government to legislate beyond public-sector employment: see the CNEL report on the bill passed by parliament on 21 January 1998, in *Lav. Inf*. 1998, 5, 72; C. Cecchella, *La riforma dell'arbitrato nelle controversie di lavoro pubblico e privato*, in *Mass. Giur. Lav*., 1999, 1/2, 78. But the doubt can be dispelled precisely by relying on the provision relating to the introduction of measures "of a general nature" to prevent dysfunctions due to an overloaded court system.

19 Constitutional Court judgement no 225 of 23 June 1994, in *Foro it*., 194, 1, 3329, according to which "unless there are general requirements and higher purposes of justice, judicial protection cannot be deferred or subordinated to the prior pursuit of administrative appeals ... with the consequent unconstitutionality of rules that provide for bars and preclusions for failure to pursue those remedies".

attempt at conciliation mandatory also for private-sector employment. It was arguable too that there had been a violation of Articles 3 and 24 of the Constitution, in relation respectively to unequal treatment between the public and private sectors and to infringement of right to judicial protection insofar as recourse thereto was burdened by excessive obstacles.

In its judgment no 276 of 13 July 2000[20] the Constitutional Court dispelled the doubts as to the constitutionality of the new regulatory framework. As regards the feared violation of Article 24 of the Constitution, it stated that the law may well impose "burdens aimed at safeguarding 'general interests' with the delays that such entails" since "a mandatory attempt at conciliation tends to satisfy the general interest from a twofold point of view: firstly, by ensuring that the increase in the number of labour disputes to be heard by the ordinary courts does not overwhelm those very courts and, secondly, by facilitating the early settlement of disputes thereby meaning that substantive claims will be satisfied more immediately than would be the case by going to trial". As regards an alleged violation of Article 3 of the Constitution, citing earlier precedent the Constitutional Court held that any application under Article 410 of the Civil Procedure Code should at the very least set out the elements to identify the claims and the legal grounds underlying the out-of-court nature of the conciliation phase, thereby harmonising the rules of the pre-trial proceedings for public and private sector workers.

Although the Constitutional Court's ruling concluded the discussion on the constitutionality of the model, it did not halt the debate in the literature on the effectiveness of the tool in terms of alleviating the workload of the courts. This debate was fuelled by the modest results achieved not only in terms of the number of attempts at conciliation undertaken but also in terms of the extent to which conciliation, even in the event of a negative outcome, served to enable the conflicting claims to be identified and clarified[21].

The growing ineffectiveness of the mechanism[22] – which came to be viewed as a mere box-ticking exercise[23] (aggravated by the inefficiency of the public apparatus called upon to manage it) and hence a burden and a delay in seeking to enforce injured rights through the courts – led once again to questions as to its constitutionality being raised before the Constitutional Court, which in judgments nos 436/2006[24]

20 Constitutional Court judgment no 276 of 13 July 2000: in *Giust. civ.*, 2000, 2499, with note by A. Briguglio, *Un'occasione per la pronuncia di una sentenza interpretativa di rigetto da parte della Consulta?*; in *Giur. Cost*., 2000, 2148; in *Corr. Giur.*, 2000, 1237; in *Mass. Giur. Lav*., 2000, 1098, with note by Tiscini; in *Not. Giur. Lav.*, 2000, 520; in *Foro it*., 2000, 1, 2752, with note by De Angelis; and in *Guid. Dir.*, 2000, 28, 35.

21 Cf. G. Arrigo, *La disciplina contrattuale della conciliazione e dell'arbitrato*, in G. Loy (ed), *La nuova disciplina della conciliazione e dell'arbitrato*, Padua, 2000, 80.

22 See R. Pessi, *La risoluzione stragiudiziale delle controversie di lavoro: una rassegna ragionata del dibattito dottrinale*, cit.

23 A. Pessi, *Gli arbitrati in materia di lavoro*, Naples, 2012.

24 Constitutional Court judgment no 436/2006, in *D. L. Riv. Crit. Dir. lav*., 2007, 2, 363.

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and 355/2007[25] declared that the said questions were inadmissible insofar as Article 410-*bis* was challenged on grounds of infringing Article 111 of the Constitution on due process.

Despite the fact that successive constitutional rulings over time have always found the 1998 changes to be constitutionally sound, the generalised introduction of a mandatory attempt at conciliation as an alternative dispute resolution tool to alleviate the workload of the courts has met with scarce enthusiasm in the literature[26].

Making an attempt at conciliation mandatory does not add anything to a tool that already enjoys advantages in law and practice[27]. Nor does it grant any greater incentive to conciliate for those who do not already have such an inclination[28], which certainly will not materialise just because an employee (or their legal counsel) is required to send a registered letter requesting conciliation to the relevant administrative conciliation board or because an employer receives a letter summoning it to appear before the board (not that dissimilar to the letters summoning it to an optional attempt at conciliation, generally ignored by employers who felt that there was little point in trying conciliation).

In reality, conciliation has never gained any traction in practice and remains very limited due to a number of reasons that discourage any interest in it. Indeed, there are many reasons why the judicial route is preferred including in particular: the obstacles to appealing against the conciliation report[29] compared to a judgment[30]; the frequent lack of reliability and competence of the members of the conciliation boards[31]; the risk of jeopardising the enforceability of a claim before the courts by virtue of delaying legal action and/or opting to try an out-of-court solution; the uncertainty surrounding the social security and tax-related advantages of conciliation and/or the alleged exces-

25 Constitutional Court judgment no 355/2007, in *Not. Jur. Lav*., 2008, 1, 76.

26 Cf. S. Magrini, *La "piccola riforma" della conciliazione e dell'arbitrato*, in *Dir. Prat. Lav*. 1998, 24, 1587; M. Magnani, *Conciliazione ed arbitrato nelle controversie di lavoro dopo il dlgs n. 80 1998*, in in *Mass. Giur. Lav*., 1999, p. 684; A. Cecchella, *La riforma dell'arbitrato nelle controversie di lavoro pubblico e privato*, in *Mass. Giur. Lav.* 1999, 1/2, 178.

27 On this point see S. Magrini, *La 'piccola riforma'*, cit., who argues that the compulsory nature of first attempting conciliation makes sense insofar as it provides the parties with a novel tool, but this is not the case in Italy where "there is an embarrassment of riches: from prior administrative conciliation; to conciliation in a trade union setting … to judicial conciliation".

28 Cf. S. Magrini, *La 'piccola riforma' della conciliazione e dell'arbitrato*, cit.

29 Cf. F. Stolfa, *Conciliazione nel diritto del lavoro*, III, Turin, 1988

30 See M. Grandi, *Impugnabilità e inoppugnabilità degli arbitri in materia di lavoro*, in *Dir. rel. Ind*., 1992, 2, 23; M. Mocella, *Sull'impugnabilità della conciliazione giudiziale, amministrativa e sindacale nel processo del lavoro*, *in Dir. rel. Ind*., 1999, 447.

31 On this point, for a highly critical view with specific reference to provincial labour and employment office (UPLMO) conciliation boards, see Manna, *Il tentativo obbligatorio di conciliazione nella riforma degli artt. 410 e segg. Cod. proc. civ. tra deflazione e legislazione occulta di sostegno*, in *Riv. Crit. Dir. lav*., 1998, 524. See also S. Caruso, *Sindacato, arbitrato e conflitto collettivo*, in *Dir. rel. ind*., 1992, 2, 48. With reference to the Spanish experience, see P. Cruz Villalon, *Conciliazione ed arbitrato in Spagna*, in *Quad. dir. lav. Rel. Ind*., 1993, 13, 170.

sive costs of conciliation according to some[32]. All reasons that militate against recourse to alternative dispute resolution options for both parties involved in a typical labour dispute[33]. And that holds true for both employees, who aspire to obtain effective satisfaction of their claims, including at enforcement level, and employers, if for no reason other than a desire to have the issue fairly assessed and resolved definitively.

And so the verdict that can be expressed on the 1998 mini-reform with the benefit of hindsight is that it certainly sought to bridge, in some respects, the gap in the *protective* potential of conciliation (and arbitration) compared to that of legal proceedings before a court of law but did not achieve the success that had been anticipated[34].

4. THE PROPOSALS FOR REFORM PUT FORWARD BY THE 2001 FOGLIA COMMISSION AND THE 2002 VACCARELLA COMMISSION.

The proposal drawn up by the Foglia Commission[35] in 2001 (established by decree on 24 July 2000) focused on the reform of the procedures for dealing with labour disputes before the courts. Accordingly, conciliation was examined only marginally within the framework of arbitration and the introduction of employment contracts certification[36]. Nonetheless, it should be noted that at the administrative-ministerial level there was a certain interest in conciliation and hence confirmation of the role that that tool could play in mitigating disagreements between the parties, in this specific case in connection with how any given employment relationship was to be classified. The Foglia proposal reiterated the distinction between conciliation in the public sector and in the private sector, where an attempt to pursue it was mandatory. Moreover, it looked favourably upon in-court rather than out-of-court conciliation[37].

Subsequently, in 2002, a proposal was put forward by the Vaccarella Commission (established by decree on 23 November 2001), which called for the attempt at conciliation to be made merely optional[38]. In fact, the Commission considered that making

32 See M. De Luca, *Il tentativo obbligatorio di conciliazione (profili proceduali e aspetti fiscali e previdenziali)*, in *Dir. prat. Lav.,* 1998, 49.

33 Cf. E. Balletti, *Potenzialità e limiti del tentativo di conciliazione delle controversie di lavoro*, in *Scritti in memoria di Massimo D'Antona*, Milan, 2004, 149.

34 Cf. E. Balletti, *Potenzialità e limiti del tentativo di conciliazione delle controversie di lavoro*, cit.

35 For critical aspects see L. De Angelis*, La giustizia del lavoro tra crisi del processo, iniziative di riforma e specializzazione del giudice mal sopportare*, in *Riv. it. Dir. lav., cit*.; Id., *Modificazioni della tutela sostanziale e giurisdizione del lavoro: profili attuali*, in *Dir. Lav., Quaderni*, n. 8, 2003, p. 27 ff.

36 On this point see E. Signorini, *Conciliazione e arbitrato nel processo del lavoro*, in *Mass. Giur. Lav.*, 2003, 5, 382.

37 For the work of the Foglia Commission, see S. Chiarloni, *Nuove prospettive di riforma per il processo del lavoro*, 2001, 8-9, 1763.; Ministero della Giustizia e Ministero del Lavoro e della Previdenza sociale, *Commissione per lo studio e revisione della normativa procedurale del lavoro*, in Foro it., 2007, 6, 189. See also, A. Vallebona, *Parola d'ordine: salvare il processo del lavoro*, in *Mass. giur. lav*., 2007, 1 ss.

38 Article 36 – "Without prejudice to the speciality of labour proceedings in accordance with current general policy, eliminate the mandatory nature of the attempt at conciliation for labour disputes [...]". Text taken from www.cittadinolex.kataweb.it.

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the attempt at conciliation mandatory was a "contradiction" since it made no sense to oblige a person whose consent was necessary for the successful outcome of the process to engage in that very process. Given the failure to implement the proposal in question, the attempt at conciliation remained mandatory and necessary.

A few more years would be needed for a substantial change to occur in this respect.

5. CONCILIATION IS NO LONGER MANDATORY UNDER LAW NO 183/2010

The labour law bill introduced in parliament in connection with the 2008 budget law finally became law after no less than seven parliamentary readings with its publication in the Official Journal on 9 November 2010, entering into force on 24 November 2010 as Law No 183/2010. Due in no small part to issues concerning also allowing decisions in labour arbitration cases to be made *ex aqueo et bono*, the bill's passage through parliament was very troubled.

Examination of the bill had started on 17 September 2008 in the Chamber of Deputies. After four parliamentary readings, the process seemed to be coming to an end on 3 March 2010[39] when it was finally approved by the Senate of the Republic. But on that occasion the President of the Republic did not promulgate it in the exercise of his power under Article 74 of the Constitution and on 31 March 2010 returned the bill to the Chamber of Deputies requesting further deliberations there. Subsequently there were three more parliamentary readings that made changes to the text based on the indications contained in the presidential message. The never-ending process concluded with final approval of the law by the Chamber of Deputies on 19 October 2010 and its publication in the Official Journal on 9 November 2010.

Leaving aside the above difficulties, hostage to some outdated political ideologies, Law No 183/2010, through Article 31 on "Conciliation and Arbitration"[40], radically reform ed conciliation in labour proceedings in a number of respects.

First, faced with the undisputable fact of slow legal proceedings in labour matters and an enormous caseload (for which social security litigation is also responsible), the legislature again felt the need to make provision for alternatives to trial with a view to alleviating the workload of the courts, preferring that route instead of what some of the social partners had expected, namely strengthening the courts and enhancing

39 On this version of the parliamentary bill see V. Speziale, *La riforma della certificazione e dell'arbitrato nel 'collegato lavoro'*, in *Dir. lav. Merc*., 2010, 139; A. Vallebona, *Una buna svolta del diritto del lavoro: il 'collegato' 2010* in *Mass. Giur. Lav.*, 2010, 4, 2010; L. Zoppoli, *Certificazione dei contratti di lavoro e arbitrato: les liaisons dangereuses*, in Auletta, Califano, Della Pietra and Rascio (eds), *Sull'arbitrato. Studi offerti a Giovanni Verde*, Napoli, 2010.

40 See Article 31 of Law No 183/2010 in particular paragraph 1 thereof rewriting Article 410 of the Civil Procedure Code. Paragraph 16 of that same Article 31 repealed Articles 410-*bis* and 412 *bis* of the Civil Procedure Code. It should be noted that, by express provision (paragraph 2 of Article 31), the mandatory nature of a prior attempt at conciliation under Article 80(4) of Legislative Decree No 276/2003 was not affected.

the relevant procedures. Even some legal scholars[41] had long since sounded the alarm, noting that parties could no longer allow themselves the luxury of referring all labour disputes to the courts and advocating the need to make the alternative tool of conciliation more attractive.

However, Article 31 of Law No 183/2010 amended Article 410 of the Civil Procedure Code in its entirety, providing that an attempt at conciliation was no longer mandatory but merely optional. It thus brought about a "compression-suppression"[42] of the obligation to attempt conciliation as a precondition to instituting legal proceeding before the courts, which in practice had led to a delay in obtaining effective protection due to the acknowledged inertia of the provincial labour departments.

Following the reform, an attempt at conciliation remained mandatory solely in connection with appeals to the courts against certification of collective bargaining agreements by the special certification commissions[43].

Secondly, Law No 183/2010 harmonised the law governing both private-sector and public-sector employment by repealing Articles 65 and 66 of the Public-Sector Employment Consolidation Law (No 165/2001). Therefore, after having served as an "unusual trailblazer"[44] for private-sector employment, public-sector employment was no longer subject to special rules precisely with reference to conciliation. That said, the reform amended Article 410 of the Civil Procedure Code by including in paragraph 8 thereof an exemption from liability of those who represent public authorities save for wilful misconduct and/or gross negligence on the part of the agent.

Further to the changes made by Law No 183/2010 an attempt at conciliation was no longer reduced to sending a registered letter to the provincial labour department because the process became much more "proceduralised"[45] so to speak. In fact, the request had to set out not only the particulars of the parties and the location of the employee's workplace but also the facts and grounds underlying the claim submitted to the

41 Cf. T. Treu, *La riforma della giustizia del lavoro: conciliazione e arbitrato*, in *Dir. Rel. Ind*., 2003, 1, 78.

42 See R. Pessi, *La protezione giurisdizionale del lavoro nella dimensione nazionale e transnazionale: riforme, ipotesi, effettività*, in *Riv. It. Dir. Lav.*, 2010, 2, p. 195.

43 Certification is an Italian procedure of a voluntary nature, aimed at certifying that the agreement to be signed meets the requirements of form and content required by law. It was established by Legislative Decree No 276/2003 and is aimed at reducing litigation on the classification of certain employment contracts. Certification covers all employment contracts, waivers and settlements, and the internal rules of cooperatives concerning contracts entered into with worker-members. Certification commissions can be established by: the bilateral bodies set up by employer trade associations and employee trade unions locally or nationally; the former local labour departments (Ministerial Decree of 21 July 2004), now local labour inspectorates; the Provinces (Ministerial Decree of 21 July 2004); the provincial councils of the association of labour consultants (commission list); the State and private universities recorded in the register kept at the Ministry of Labour and Social Policies (Inter-Ministerial Decree of 14 June 2004); the Ministry of Labour and Social Policies (pursuant to Article 76(1) (c-*bis*) of Legislative Decree No 2003 of 10 September 2006).

44 See L. De Angelis, *Collegato lavoro e diritto procedurale: considerazioni di primo momento*, in WP C.S.D.L.E. "Massimo D'Antona".IT – 111/2010.

45 Cf. E. Baracco, *Il 'Collegato lavoro': le principali novità*, in *Lav. Giur*., 2010, 12, 1187.

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conciliation board[46]. If the other party wished to engage in conciliation, it had to submit a defence brief setting out the factual and legal objections and any counterclaims, to the point that one could consider the process as a veritable pre-trial conference[47].

Generally speaking, a retrospective assessment of the impact that Law No 183/2010 has had on conciliation – in view of its initial objectives – is positive given the poor results achieved previously when an attempt at conciliation had been mandatory[48] and treated as a box-ticking exercise in practice. That said, if one then considers that conciliation often does nothing more than further and unnecessarily prolong the time required to reach judgment in a trial that 90% of the time goes ahead in any event, then arguably an attempt at conciliation still fails to act as an effective litigation filter[49].

6. NOSTALGIA FOR MANDATORY CONCILIATION: DISMISSALS ON BUSINESS GROUNDS AND LAW NO 92/2012

Only two years after Law No 183/2010 had been enacted, Law No 92 of 28 June 2012 (known as the "Fornero Reform") revisited labour law disputes in two respects. First, with the introduction of a special procedure for disputes concerning appeals against dismissals[50], "including when questions relating to the classification of an employment relationship must be resolved"[51]. Second, with the introduction of a mandatory attempt at conciliation in cases of dismissal on business grounds, aimed at finding an alternative to layoffs. Article 1(40) of Law No 92/2012, amending Article 7 of Law No 604/1966, provided for a mandatory attempt at conciliation pursuant to Article 410 of the Civil Procedure Code before the boards set up at the National Labour Inspectorate[52] in cases in which an employer, meeting the size requirements set forth in Article 18(8) of Law No 300/1970, wished to make dismissals on business grounds[53].

46 Cf. M. De Cristofaro, *Le riforme del 1998*, in Consolo, Luiso, Giarda and Spangher (eds), *Processo civile e processo penale*, 1998, Milan, 202. Consistent with scholarly opinion that had remarked how the greater detail of the relevant provisions relating to the mandatory prior attempt at conciliation as regards public-sector employees facilitated more efficient outcomes than in the private sector, where – strictly speaking – the former Article 410 did not require any particular statement setting out the circumstances underlying the dispute.

47 Cf. R. Tiscini, *Nuovi disegni di legge sulle controversie di lavoro tra conciliazione e arbitrato*, in *Mass. Giur. Lav.,* 2010, 5, 372.

48 R. Tiscini, *Nuovi disegni di legge sulle controversie di lavoro tra conciliazione e arbitrato*, cit.

49 See G. Verde, *Lineamenti di diritto dell'arbitrato*, Turin, 2021, 61. On this topic see also E. D'Alessandro, *Arbitrato in materia di previdenza e assistenza obbligatorie*, in *Dizionario dell'arbitrato*, with preface by Irti, Turin 1997, 53.

50 Permit me to refer to S. Caponetti, (*Few) Lights and (many) shadows on the new process procedure introduced by the reform of the labour market in Italy for the appeal of layoffs*', in *Civ. Proc. Review*, 2013, no 3, 51 ff.

51 On this specific topic see A. Pessi, *Conciliazione e arbitrato*, in R. Pessi, G. Proia and A. Vallebona, *Approfondimenti di diritto del lavoro*, Turin, 2021, 247.

52 For more insight see F. Liso, *Le norme in materia di flessibilità in uscita nel disegno di legge Fornero*, in *Il dibattito sulla riforma italiana del mercato del lavoro*, at http://csdle.lex.unict.

53 C. Cester, *Il progetto di riforma della disciplina dei licenziamenti*, in *Arg. Dir. Lav*., 2012, 578.

In theory the attempt should allow the parties to find alternatives to layoffs in cases where the dismissal "on grounds inherent to production, the organisation of work and the proper functioning thereof" (Article 3(1) of Law No 604/1966) constitutes a last resort.

The procedure, which commences with the employer's communication to the labour inspectorate (a copy of which is also forwarded to the employee), should be concluded within 20 days after the conciliation board summons the parties (which it is obliged to do within 7 days of receiving the request). The communication must contain the employer's declaration of its intention to dismiss the employee on business grounds as well as state the reasons for the dismissal and any outplacement measures envisaged for the employee involved[54]. The procedure ends positively if the parties find alternative solutions to dismissal or an agreement on the continuation of the relationship. On the contrary, in the event of a failure to reach an agreement, the law provides that the effects of the dismissal are to be retroactive to the time of receipt of the initial communication by the employee and the conciliation board, except for the suspension of the dismissal in cases of maternity/paternity or occupational injury (Article 1(41) of Law No 92/2012)[55].

Even in the event of failure to reach an agreement, the conciliation board must draw up a report describing how the procedure unfolded and the parties' conduct because their behaviour may be relevant in the event of litigation for the purposes of determining the compensation due under Article 18(7) of Law No 300/1970 and deciding on legal costs pursuant to Articles 91 and 92 of the Civil Procedure Code[56]. A breach of the procedure means that the dismissal would be "ineffective" but not (paradoxically) termination itself, which would still be valid and the employer would be ordered in that

54 Cf. G. Sigillò Massara, *Tutele alternative dei diritti dei lavoratori*, Turin, 2017.

55 D. Borghesi, *Licenziamenti: tentativo di conciliazione e rito speciale*, in Carinci, Miscione, *Commentario alla riforma Fornero*, Milanofiori Assago, 2012, 14. According to the author, in the course of the albeit brief lapse of time that must elapse between the manifestation in official form of the intention to dismiss and the communication of the actual dismissal, events can occur that change the situation thereby rendering unlawful a dismissal that would otherwise have been lawful at the time that the intention to make it was made known. For example, it may happen that, in the time between being informed of the intention to dismiss and the communication of the actual dismissal, the worker my become ill, pregnant or publish the banns of marriage. In order to avoid this inconvenience, a paragraph was added in the Senate that the effects of the dismissal would be retroactive to when the intention to dismiss was notified to the local labour department and the worker concerned. This should suffice so as to ensure that it is not the situation existing at the time of the communication of the actual dismissal that is relevant but that in which a worker finds himself or herself when initially informed of the intention to dismiss.

56 The issue of the conduct of the parties during the attempt at conciliation is worth mentioning. In particular, non-acceptance of the proposal made by the board has an entirely *sui generis* significance in the subsequent proceedings challenging the dismissal. In fact, not only may the court take it into account for the purposes of awarding the costs of the proceedings but also in determining the amount of compensation provided for in Article 18(8) of the Workers Statute. Consequently, the conduct of the parties becomes one of the factors that, appropriately balanced with others, must be taken into account in assessing the amount of compensation between the minimum and the maximum provided for by law in cases of unlawful dismissal.

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case to pay reduced compensation of between 6 and 12 months' remuneration based on the last overall de facto monthly remuneration (Article 18(6) of Law No 300/1970)[57].

7. THE JOBS ACT AND THE PROBLEM OF THE EFFECTIVENESS OF THE PROTECTION OF WORKERS' RIGHTS

Following the profound systemic changes made from 2015 to the present day in relation to the labour market and to the sanctions in connection with unlawful dismissal focusing more on compensation rather than reinstatement (a trend that had already been initiated by the Fornero Reform in 2012), it was to be expected that conciliation would regain a certain centrality in a context characterised by an effort to anchor legal certainty and its effectiveness to the economic certainty of the effects of termination, circumscribing the "value of job stability"[58]. It is clear that in the transition to a system based more on affording protection by way of compensation as opposed to the *old all-inclusive* protection by way of reinstatement in cases of unlawful dismissal, a key role would once again be played by conciliation, even if only optional (under Legislative Decree No 23/2015) considering that it would surely be preferred by the parties for its speed and certainty if recourse to the courts would not lead to anything more than compensation and not reinstatement[59].

It is in that light that one can interpret Article 6 of Legislative Decree No 23/2015 insofar as it provides for solely an optional attempt at conciliation for all types of employees hired from 7 March 2015 onwards. From that same date an optional attempt at conciliation also replaces the requirement of a mandatory attempt at conciliation for dismissals on business grounds that had been introduced by Law No 92/2012. Therefore, whether attempting conciliation is optional or mandatory will depend on the date an employee is hired, given that Legislative Decree No 23/2015 itself has ruled out any necessity for a mandatory attempt at conciliation under Law No 92/2012 for all permanent employees hired from 7 March 2015 onwards or for those employees whose

57 Cf. on the subject A. Vallebona, *La disciplina sostanziale dei licenziamenti*, in F. Luiso, R. Tiscini and A. Vallebona (eds), *La nuova disciplina sostanziale e processuale dei licenziamenti*, Turin, 2013, 56-57; A. Pessi, *Conciliazione e arbitrato*, in R. Pessi, G. Proia and A. Vallebona, *Approfondimenti di diritto del lavoro*, Turin, 2021, 247. See also, O. Mazzotta, *I molti nodi irrisolti nel nuovo art. 18 dello Statuto dei lavoratori*, in *Biblioteca '20 Maggio'* – 2/2012, p. 385 ff.

58 On this point see also Constitutional Court judgment no 194/2018, in Mass. Giur. Lav., 2018, 9. On topic, see, O. Mazzotta, *Cosa ci insegna la Corte costituzionale sul contratto a tutele crescenti*, in *Labor*, 6, 2018, p. 5 and G. Proia, *Le tutele contro i licenziamenti dopo la pronuncia della corte costituzionale*, in *Mass. Giur. Lav.,* 2018, p. 198.

59 A. Pessi, *Conciliazione e arbitrato*, in *Approfondimenti di diritto del lavoro*, in R. Pessi, G. Proia and A. Vallebona, cit., and R. Voza, *"Gli farò un'offerta che non potrà rifiutare": l'irresistibile forza deflattiva dell'art. 6 del d.lgs. n. 23 del 2015*, in *Lav. Jur*., 2015, 8-9, 778. The latter analyses the rules governing an offer of conciliation in the event of dismissal, introduced by Article 6 of Legislative Decree No 23/2015 on the subject of permanent employment contracts with increasing protection, with particular reference to the scope of application of model of conciliation, its characteristics and effects. All in all, this is a further step in the process of easing the burden on the courts that has long been a feature of Italian labour law.

fixed-term employment contract or apprenticeship contract is converted into a permanent contract as of the same date.

Conciliation under Law No 92/2012 did not give rise to much criticism[60] since it was considered to be suited to the type of dismissal involved and was inapplicable to employees hired from 7 March 2015 onwards[61]. By contrast, the introduction of a new form of conciliation under Article 6 of Legislative Decree No 23/2015[62] or, as some legal scholars would say, the extension of the scope of application of a well-known from of settlement-related conciliation, has attracted criticism centred on the issue of the effectiveness of the protection of workers' rights[63]. It is feared that the introduction of this new form of conciliation will lead to monetary compensation for dismissal becoming the norm in labour law thereby bolstering policies that advocate "the replacement of judicial control with a monetary filter"[64]. In fact, Article 6 of Legislative Decree No 23/2015 enables employers to offer dismissed employees, regardless of the grounds of termination[65] and also in cases of collective redundancies[66], a sum of money exempt from income tax and social security contributions[67].

Article 6 provides that the conciliation bodies called upon to manage the conciliation process are the fora referred to in the fourth paragraph of Article 2113 of the Civil Code and Article 76 of Legislative Decree No 276/2003[68]. Guaranteeing protected fora

60 Apart from calls to widen the number of workers covered by not limiting it solely to medium-sized and large scale enterprises, regarding which, D. Borghesi, *Un tentativo di conciliazione obbligatorio e preventivo*, in *Giur. It*., 2014, 449. On this point see also P. Albi, *Il licenziamento individuale per giustificato motivo oggettivo dopo la riforma Monti-Fornero*, *Biblioteca '20 Maggio'* - 2/2012, 401.

61 A. Boscati, *Il campo di applicazione del d.lgs. 23/2015 e il nodo del pubblico impiego*, in Biasi - G. Zilio Grandi, (eds), *Commentario breve alla riforma "jobs act"*, Padua, 2016.

62 On topic, see, V. Speziale, *Le politiche del lavoro del Governo Renzi: il Jobs Act e la riforma dei contratti e di altre discipline del rapporto di lavoro*, in *WP C.S.D.L.E. "Massimo D'Antona".IT*, 2014, 233, F. Carinci, *Jobs Act, atto II: la legge delega sul mercato del lavoro*, in *Arg. Dir. Lav.,* 2015, 1, p. 1 ff and F. Pasquini, *Jobs act e conciliazione: pochi, maledetti e subito…ma non per tutti*, in Carinci - Tiraboschi (eds), *I decreti attuativi del Jobs Act: prima lettura e interpretazioni*, Modena, 2015, p. 82

63 The issue has arisen with particular reference to waivers and settlements made during conciliation in a trade union setting: on this point, see R. Voza, *L'autonomia individuale assistita nel diritto del lavoro*, Bari, 2007, 101 ff. For subsequent case law, see Supreme Court judgment no 13217 of 22 May 2008, in *Mass. Giur. lav.,* 2009, 77 ff., and Supreme Court judgment no 24024 of 23 October 2013, in this journal, 2014, 475 ff. Among recent contributions from legal scholars, see O Dessì, *L'indisponibilità dei diritti del lavoratore secondo l'art. 2113 c.c.*, Turin, 2011, 180 ff.

64 A. Garilli, *Nuova disciplina dei licenziamenti e tecniche di prevenzione del conflitto*, in *Riv. It. Dir. Lav*., 2015, 2, 315.

65 See G. Mimmo, *La disciplina del licenziamento nell'ambito del contratto a tutele crescenti*, at giustiziacivile.com, 24 April 2015.

66 On this type of dismissals, see G. Ferraro, *I licenziamenti collettivi nel Jobs Act*, in *Riv. It. Dir. Lav*. 2015, I, 195.

67 Cf. V. Filì, *Tutele risarcitoria e indennitaria: profili quantificatori, previdenziali e fiscali*, in *Le tutele per i licenziamenti e per la disoccupazione involontaria nel Jobs Act 2*, Bari, 2015, 211. Of the same opinion, F. Amendola, *L'offerta di conciliazione preventiva*, in G. Ferraro (ed), *I licenziamenti nel contratto "a tutele crescenti"*, *Quad. arg. dir. lav*., 2015, 165; M. Marazza, *Il regime sanzionatorio dei licenziamenti nel Jobs Act*, in *Arg. dir. lav*., 2015, 311, note 5.

68 P. Albi, *Garanzie dei diritti e stabilità del rapporto di lavoro*, Milan, 2013, p. 43; Cass. 18 maro 2014, n. 6265, in *Mass. Foro It.*, 2014, col. 210; Cass. 19 ottobre 2009, n. 22105, *Mass. Foro It.*, 2009, col. 1287; Trib. Milano 9 gennaio 2013, in *Mass. Giur. Lav.*, 2013, p. 588, con nota di P. Polliani; contra, S. Ciucciovino, *Rinunce e*

for employees who intend to waive their right to contest the dismissal, although aware of workers' entitlement in this regard in light of well-settled case law[69], would seem to be consistent not only with contemporary policy but also the need for oversight of the conciliation process due to the obvious tax and social security ramifications[70]. The employer's offer, which must be received by the non-extendable deadline of 60 days after communication of the dismissal, must set out the amount of money offered, which in accordance with Article 6 itself is to be one month of remuneration (as calculated for severance pay purposes) for each year of service, ranging from a minimum of 3 to a maximum of 18 months' remuneration (now amended to a minimum of 3 and a maximum of 27 months' remuneration)[71]. If the employer does not meet the size requirements set out in Article 18 of Law No 300/1970[72], the amount is reduced to a minimum of 1.5 and a maximum of 6 months' remuneration[73].

In its offer the employer must state its readiness to pay the sum by bank draft for immediate delivery to the conciliation forum. Acceptance of the bank draft entails the termination of the employment relationship from the date of dismissal, the granting of the applicable income tax and social security contributions exemption and eligibility for unemployment insurance benefit[74]. During the conciliation process the parties may well agree on a different figure or on the payment of sums on other grounds, which extra amount however – as specified by Article 6 itself – will not be exempt from income tax and social security contributions[75].

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transazioni, in G. Santoro-Passarelli (ed), *Diritto e processo del lavoro e della previdenza sociale: privato e pubblico*, Turin, 2014, p. 1541, according to which «if a dispute arises concerning the lawfulness of the dismissal given to the worker, the worker may dispose of the right of appeal by means of a waiver or a transaction which, pursuant to art. 2113, will be invalid, having as object rights deriving from mandatory rules, unless it is not made in the forms provided for by the last paragraph of art. 2113 c.c.». The argument changes, obviously, if the transaction also involves other unavailable rights arising from mandatory rules of law or collective agreement.

69 See, without claiming to be exhaustive, Supreme Court judgment no 22105 of 19 October 2009, in *Guida al dir*., 2010, 1, 51; Supreme Court judgment of 18 March 2014, in *Giust, civ. mass*., 2014; and Civil Supreme Court judgment no 13134 of 3 October 2000. In the same vein, Civil Supreme Court judgments nos 5940 of 24 March 2004, 304 of 14 January 1998, 4780 of 28 March 2003 and 8263 of 17 June 2000. Again in the same vein, Civil Supreme Court judgments nos 4943 of 1 April 2003, 9062 of 12 May 2004, 17330 of 25 August 2005 and 7543 of 30 March 2006. And with reference to payments made not in execution of provisional judgments but of mere interim orders, Civil Supreme Court judgments nos 16037 of 17 August 2004 and 26627 of 13 December 2006.

70 A. Pessi, *Conciliazione e arbitrato*, in R. Pessi, G. Proia and A. Vallebona, *Approfondimenti di diritto del lavoro*, cit.

71 As provided for in the 'Dignity Decree', Article 3(1-*bis*) of Law-Decree No 87 of 12 July 2018, converted by parliament into Law No 96 of 9 August 2018.

72 These are medium-sized companies, i.e. at least 15 employees per production unit or 60 nationwide.

73 M. Novella, *Derogabilità collettiva e individuale del regime a tutele crescenti*, in Biasi – Zilio Grandi, (eds), *Commentario breve alla riforma "jobs act"*, Padua, 2016.

74 See Network of "Studi legali- lavoro", in Scarpelli - Fezzi (eds), *I quaderni di Wikilabou*r – Guida al Jobs Act 2, Milan, 2015, p. 67

75 See, A. Garilli, *Nuova disciplina dei licenziamenti e tecniche di prevenzione del conflitto*, in *Riv. It. Dir. Lav.,* 2015, I, p. 223 ff; F. Perrone, *Questioni processuali attorno al contratto a tutele crescenti*, in Biasi – Zilio Grandi, (eds), *Commentario breve alla riforma "jobs act"*, Padua, 2016; F. Rossi, *L'offerta di conciliazione prevista dall'art. 6 d. lgs. n. 23 del 2015*, in *Lav. Giur*., 2015, 8-9, p. 784 and M. Falsone, *La conciliazione ex art. 6 d. lgs. 23/2015 tra autonomia privata e incentivi statali*, in *Biblioteca '20 Maggio'* – 2/2015, p. 454.

8. SOME FINAL CLARIFICATIONS BETWEEN PROBLEMATIC ISSUES AND NEW HORIZONS

To sum up this study on conciliation in labour disputes, there is currently a proliferation of fora and a broadening of the objective and subjective scope of protection actionable through conciliation.

There are as many as seven conciliation options that can be pursued depending on the subject matter of the dispute to be resolved or on the forum that the applicant deems most suitable:

a) an attempt at conciliation, pursuant to Article 410 of the Civil Procedure Code, before a provincial labour department;

b) an attempt at conciliation before a court of law pursuant to Article 420 of the Civil Procedure Code, where nowadays judges are called upon not only to resolve the dispute through conciliation but also to come up with a settlement proposal;

c) conciliation provided for in collective bargaining agreements and contracts;

d) conciliation at the certification commissions pursuant to Article 76 of Legislative Decree No 276/2003 (where conciliation as a tool remains mandatory for the initiation of any appeal against certification);

e) conciliation in the context of inspections;

f) a mandatory attempt at conciliation in cases of dismissal on business grounds pursuant to Law No 92/2012 for those hired by 7 March 2015;

g) an optional attempt at conciliation pursuant to Article 6 of Legislative Decree No 23/2015 for those hired on permanent contracts from 7 March 2015 onwards[76].

Wanting then to consider institutions similar to conciliation but nevertheless directed in that same direction, we could also include, within this list, an eighth form: assisted negotiation[77].

76 Summarises the existing forms of conciliation A. Pessi, *Conciliazione e arbitrato*, in R. Pessi, G. Proia and A. Vallebona, *Approfondimenti di diritto del lavoro,* cit.

77 Legislative Decree No. 149 of 2022 (known as the 'Cartabia reform'), in a deflation view to civil litigation, introduced assisted negotiation into our legal system also for labour disputes. The reform introduced Article 2-ter in Decree-Law No. 132 of 2014 (converted into Law No. 162 of 2014), expanding access to assisted negotiation to disputes under Article 409 of the Code of Civil Procedure. According to the law, It has been expressly provided for the applicability of Article 2113 of the Civil Code to assisted negotiation. For labour disputes, as specified in the new Article 2-ter, negotiation is optional, as it is not a condition for the application to proceed. In negotiations, each party must be assisted by at least one lawyer, in addition to the presence (if any) of an employment counsellor. Hitherto, in protected venues, the worker's rights have been protected by the presence of 'institutional' parties, who are able to guarantee the veracity of waivers and settlements; in assisted negotiation, on the other hand, it is the presence of the lawyer who guarantees the worker's protection, in addition to the possible co-presence of an employment consultant. The new rule requires that the agreement reached at the end of the assisted negotiation procedure be transmitted, by either party, to one

In light of what has been stated so far, there would seem to be some real problems and critical issues in relation to conciliation as regards the most recent development in the area, namely, the optional attempt at conciliation under Article 6 of Legislative Decree No 23/2015, precisely because it is inclined to trigger a mechanism for the resolution of disputes centred on money and not the effective protection of workers' rights[78]. If the legislature does not seem to have abandoned the technique of an axiologically oriented reading of labour law with respect to the other methods of conciliation or the subject matter that conciliation may cover, the same is not true in the latest reform on conciliation linked as aforesaid to a general "revolution" with respect to the "Aristotelian dogmas of labour law"[79] and where a loss of effectiveness of employees' rights seems to be looming not only at the judicial level but also at the level of out-of-court settlements of disputes. With the emergence of new legal policy options that would seem to change the set-up of values traditionally prevailing in the matter, assigning greater importance to the values of economic certainty and speedy procedure in terminating employment relationships rather than to the value of the effectiveness of the protection of employees' rights.

On the other hand, it should not be forgotten how Constitutional Court judgment no 194/2018[80] – in declaring Article 3(1) of Legislative Decree No 23/2015 unconstitutional insofar as it calculated the compensation due to a worker in the event of unlawful dismissal in a rigid manner based exclusively on the criterion of length of service – restores the courts' wide margin of discretion in determining the compensation payable to unlawfully dismissed workers. Thus, the conciliation option provided for in Article 6 of Legislative Decree No 23/2015, where the amount of compensation, albeit

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of the Certification Commissions referred to in Article 76 of Legislative Decree No. 276 of 2003 within ten days. It is not clear what is the rationale behind this communication, which is moreover subject to a strict deadline of ten days from the conclusion of the agreement. Indeed, the law does not place any task of verification, control or analysis of the contents on the Commissions receiving notification of the assisted negotiation. There seems, therefore, to be only a burden of registration and preservation. On the subject see: A. Sitzia – S. Caponetti, *La normativa italiana in materia di protezione dei salari*, Roma, Organizzazione Internazionale del Lavoro, 2023; L. Biarella, *Giustizia civile, la riforma Cartabia punta sulle alternative al contenzioso in aula (D. lgs 10 ottobre 2022, n. 149),* in *Guida al Dir*., 2023, 3, p. 16; B. Nacar, *Riforma Cartabia e riti alternativi: piccole modifiche all'insegna dell'efficienza del processo*, in *Dir. Pen. Proc*., 2023, 1, p. 166; A. Vitale, *Negoziazione assistita nelle controversie di lavoro*, in *Dir. Prat. Lav*., 2023, 11, p. 681; S. Boccagna, *La negoziazione assistita e le controversie di lavoro: verso il tramonto della norma inderogabile?,* in *Dir. Lav. Merc*., 2022, 1, p. 67; B. Piacci, *La negoziazione assistita nelle controversie di lavoro*, in *Lav. Giur.,* 2022, 7, p. 669; P. Licci, *La negoziazione assistita per le controversie di lavoro,* in *Giust. Civ.,* 2023, 2, p. 243 e M. Lamberti, *La negoziazione assistita dopo il D. Lgs. n. 149/2022: controversie di lavoro e ADR (Alternative Dispute Resolution*), in *Lav. Giur*., 2023, 7, p. 675.

78 See for more information, M. Falsone, *La conciliazione ex art. 6 d. lgs. 23/2015 tra autonomia privata e incentivi statali,* cit.

79 A. Pessi, *Conciliazione e arbitrato*, in R. Pessi, G. Proia and A. Vallebona, *Approfondimenti di diritto del lavoro*, cit.

80 On which see the views expressed by G. Proia, *Le tutele contro il licenziamento dopo la pronuncia della Corte costituzionale*, in *Mass. Giur. Lav*., 1, 2019, 197, and G. Sigillò Massara, *La tutela contro i licenziamenti illegittimi dopo la pronuncia della Corte costituzionale 26 settembre 2018*, in *Mass. Giur. Lav*., 2019, 1, 213. Permit me to also cite S. Caponetti, *Alla ricerca del risarcimento giusto e certo. La 'nuova' tutela risarcitoria in caso di licenziamento illegittimo tra politica del diritto e general deterrence*, in *Ratio Iuris*, 11 December 2020.

tax-free, is fixed in a predetermined manner by that same article as a sum ranging from a minimum of 3 to a maximum of 27 months' salary, certainly loses its attractiveness from the point of view of cost effectiveness[81].

Moreover, even current labour legislation, with the provisions introduced in relation to fixed-term employment contracts and temporary agency work (Law-Decree No 87 of 12 July 2018 converted by parliament into Law No 96 of 9 August 2018), would seem to be a departure from recent attempts by the legislature to supersede the labour law dogma that the parties *cannot* derogate from the law. Consider, for example, the legislation on working-from-home: in a Copernican revolution, ample space is granted to freedom of contract through a working-from-home pact, which may regulate that portion of work carried out outside company premises, rest periods, the right to disconnection (Article 19 of Law No 81/2017)[82] or the new management of health and safety.

It is undoubtedly true that the most recent legal policy options and the coeval interpretation of the Constitutional Court would seem to refound labour law on the canon of non-derogation from the law in an attempt to protect workers from the incessant changes in industry and a globalised economic reality[83]. From this perspective, the conciliation referred to in Article 6 of Legislative Decree No 23/2015 may regain its centrality, in terms of speeding up justice and legal certainty, in the form of conciliation in court, where judges in the "settlement or conciliation proposal" referred to in Article 420 of the Civil Procedure Code are the only ones capable of guaranteeing "a fair system of protections balanced with the values of the company" and aimed at the "need for personalisation of the damage suffered by the worker" albeit "within boundaries set by the legislature to guarantee a calibrated modulation of the compensation due, within a minimum and a maximum threshold"[84].

9. FINAL REFLECTIONS AND FUTURE PROSPECTS

In conclusion, it must be emphasised that the problem of the effectiveness of workers' rights is only one of the critical issues concerning conciliation in labour disputes. In fact, recourse to alternatives to the courts does not appear to be an integral part of the Italian legal tradition, unlike, for example, in many common law jurisdictions[85]. The

81 See A. Pessi *Conciliazione e arbitrato*, in R. Pessi, G. Proia and A. Vallebona, *Approfondimenti di diritto del lavoro*, cit. and M. Falsone, *La conciliazione ex art. 6 d. lgs. 23/2015 tra autonomia privata e incentivi statali,* cit.

82 On the topic, without claiming to be exhaustive, cf. G. Proia, *L'accordo individuale e le modalità di esecuzione e di cessazione della prestazione di lavoro agile*, in L. Fiorillo and A. Perulli (eds), *Il Jobs Act del lavoro autonomo e del lavoro agile*, Turin, 2017; Z. Grandi and M. Biasi (eds), *Commentario breve allo Statuto del lavoro autonomo e del lavoro agile*, Padua, 2018.

83 A. Turzi, *Il diritto stocastico. La disciplina italiana dei licenziamenti dopo la sentenza della Corte costituzionale n. 194 del 2018 (e decreto dignità)*, in *Dir. Rel. Ind*., 2019, 255-256.

84 The reference is again to Constitutional Court judgments nos 194/2018 and 150/2020.

85 The barely use of these dispute settlement instruments is also an example of this in concrete reality.

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way that ADR has been perceived within our legal system is nothing but a reflection of the psychological-cultural attitude that our society generally manifests in approaching a conflict[86].

There is a propensity to consider it above all an anomalous event, a problem to be solved in an exclusively technical manner by persons professionally trained to do so within a formalised trial-like structure. All technologically advanced societies exhibit this tendency to varying degrees: there is, so to speak, a widespread "lack of imagination" that leads one to consider a judgement, i.e. a decision imposed by an external power, as the main if not the only practicable method of finding a solution. When faced with a conflict, there is an inclination to determine its causes in order to allocate responsibility for it and rarely does one ask what the aims and possibilities are. It is precisely for these reasons that the latest changes are unlikely to be fully implemented in reality. In a country like Italy, where taking legal action is the immediate goal of the average citizen who encounters any kind of labour problem, alternatives to the courts could take off only if backed up by measures such as tax incentives (as it was partly done in one of the latest reforms), so as to make recourse to out-of-court remedies more attractive to employers and employees alike.

Perhaps the Copernican revolution that one would need to start thinking about lies in the direction of negotiation[87], i.e. an osmosis between conciliation and negotiation. Not statutory assisted negotiation under Law-Decree No 162 of 12 September 2014[88] (and enhanced with integrations by Legislative Decree No. 149 of 2022) converted with amendments by parliament into Law No 162 of 10 November 2014, but more the US model. What the current conciliation framework in Italy lacks is a more meaningful (and palatable) mechanism for the parties that takes their interests into account. On the other hand, the area of interests appears to be larger than that of individual rights,

86 For a broader study of the subject, see: M. A. Quiroz Vitale, *Schema per uno studio socio-giuridico della negoziazione assistita in Italia*, in *Soc. Dir*., 2019, 7, p. 11. The Author critically analyzes the first static results of the negotiation agreements drawn up by the National Forensic Council, to suggest new strands of socio-juridical research able to enhance the emerging phenomenon of "forensic jurisdiction" and to make the role of lawyers understand as specialized legal actors able to direct the private legal systems, to which the ADR belong, towards the acquisition of more democratic and equitable characteristics. Such studies are also useful for guiding the choices of the Legislature that in our country seems to be trying to change procedural models developed abroad (such as the French participatory procedure, the Canadian delegated arbitration and more generally the US Collaborative Law) without a prior analysis of the conditions that can make these institutions more consistent with the national legal culture and more effective their impact on society.

87 The negotiation procedure consists of an agreement by which the parties agree to cooperate sincerely and in good faith to resolve a dispute amicably through the assistance of lawyers. Needless to say, the mutual concessions do not concern rights, the actual existence of which is and remains unknown, but rather claims under Article 1371 of the Civil Code, except in the case of an uncontested but merely unsatisfied claim. A settlement cannot be set aside for error of law concerning the merits of the dispute (Article 1969 of the Civil Code, which unequivocally confirms that a negotiated settlement of a dispute does not presuppose an actual finding and indeed the requirement therefor is ruled out).

88 Enacting "Urgent measures to alleviate the workload of the courts and other steps to tackle the backlog in civil proceedings".

as these are included. Therefore, while resolving a conflict at the level of interests may not be easy from the point of view of managing the relationship (since human beings must be placed at the centre and their needs, prejudices and convictions must be confronted), it will certainly be much easier on the level of defining the substance given the quantity of resources (the interests, in fact) that will be available and on which the negotiator will be able to work.

If it is true that "individual rights" consist (solely) of those categories of interests regulated by the legislature for the sake of expediency (the exclusion of categories of interests from regulation may not be due to a lack of worthiness but may depend on an evaluation of convenience or a "legislative policy choice"), it is likewise true that negotiation can become an instrument for taking into account all the interests of the parties, even those that have not acquired a specific legal relevance (e.g. reputation, apologies, safety, etc.). Interests that, precisely through this method of conflict resolution, can then be effectively combined with those that the legislature as matter of policy has classed as individual rights. From the foregoing, it is evident that the heart of the negotiation process – on which the skill of the effective negotiator must be developed – consists, without prejudice to the necessary and prerequisite ability to manage the relationship, of the ability to identify the actual interests of the parties.

However, a full discourse on a hypothetical reform is not up to this paper nor to this writer, but to the legislature, which bears the arduous task of implementing future reforms to make conciliation more feasible, always keeping in mind a famous expression of the President of the United States of America Abraham Lincoln: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses, and waste of time."

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