

**A 20 YEARS ANALYSIS IN TRYING TO
“ACHIEVE A BALANCED RELATIONSHIP
BETWEEN MEDIATION AND JUDICIAL
PROCEEDINGS” IN EUROPE**

ATHENS – 4 OCTOBER 2017

THE GOAL OF THE 2008 EU DIRECTIVE ON MEDIATION



ART. 1

The objective... is to facilitate access to alternative dispute resolution ... by ensuring a balanced relationship between mediation and judicial proceedings.

ART. 4

Ensuring the quality of mediation

ART. 5

Referral to mediation

ART. 6

Enforceability of agreements resulting from mediation

ART. 7

Confidentiality of mediation

HOW TO MEASURE A BALANCED RELATIONSHIP?



DIRECTORATE-GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**



The Implementation of
the Mediation Directive
29 November 2016

Achieving a Balanced Relationship between Mediation and Judicial Proceedings

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IN-DEPTH ANALYSIS

Abstract

The 2008 EU Directive on Mediation has been a key milestone for all Member States in introducing various national legislation on mediation in civil and commercial matters. However, the goals stated in Article 1 of the Directive, towards encouraging the use of mediation and especially achieving a "balanced relationship between mediation and judicial proceedings" have clearly not been realized. This paper, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs upon request by the JURI Committee, examines this issue in detail. Despite the lack of homogeneous statistics, in almost all of the Member States mediation is used in less than 1% of the cases in court: for 1 mediation, 100 cases go to court. The only exception is the result of the Required Initial Mediation Session model currently used in Italy in a small portion of civil cases which is emerging as a best practice. The EU legislator should consider revising Article 5.2 of the Directive, requiring parties, in certain disputes, to participate at least in an initial mediation session with a trained mediator. This mediation attempt should be fast and inexpensive. As an alternative, the EU should require the Member States to use the current version of Article 5.2 to a fuller extent, taking into consideration the type of dispute.

TWO INDEXES TO MEASURE THE BALANCED RELATIONSHIP



1

Nr. of Mediations
to Nr. of Cases in Court

2

Mediation Success Rate

**Mediations/
Cases
in Court Rate**

100%

50%

0%

50%

100%

I. Many
mediations with
low success rate

II. Many
mediations with
high success rate

III. Few
mediations with
low success rate

IV. Few
mediations with
high success rate

Mediation Success Rate

BALANCE RELATIONSHIP MATRIX IN GREECE



Balance Relationship Index

Nr. of Mediations

_____ x 100 % = _____ x100%=

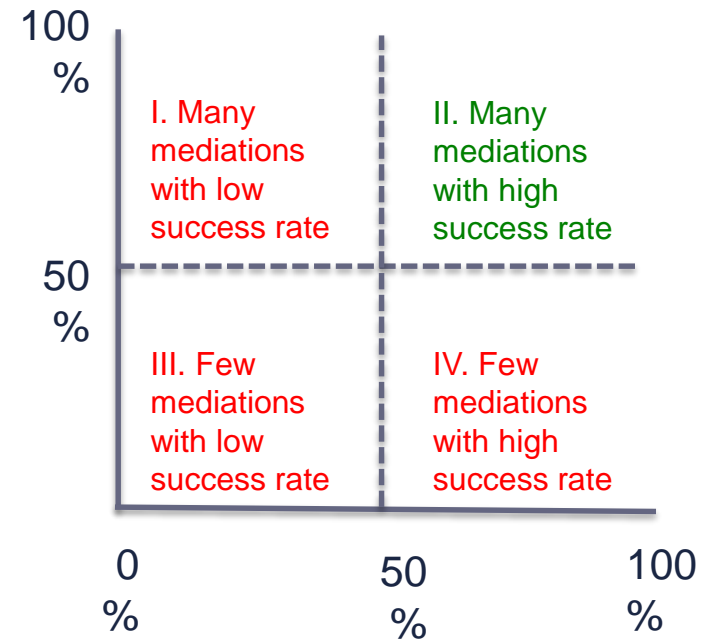
Nr. of Case in Court

Success Mediation Index

Nr. of Settlements

_____ x 100 % = _____ x100%=

Nr. of Mediations



THE EU “MEDIATION PARADOX”



ONLY 0.05%

of civil cases
mediated

20 MILLION

civil cases filed
in trial courts

NO BALANCED RELATIONSHIP

*between mediation and judicial proceedings
(required by art. 1 of Mediation Directive)*



**Massive
economic loss**

BILLIONS WOULD BE SAVED

*even if only 50% of mediations end with an
agreement*



European
Commission
for the Efficiency
of Justice

Commission
européenne
pour l'efficacité
de la justice



IMPACT OF CEPEJ GUIDELINES ON MEDIATION

INTRODUCTION

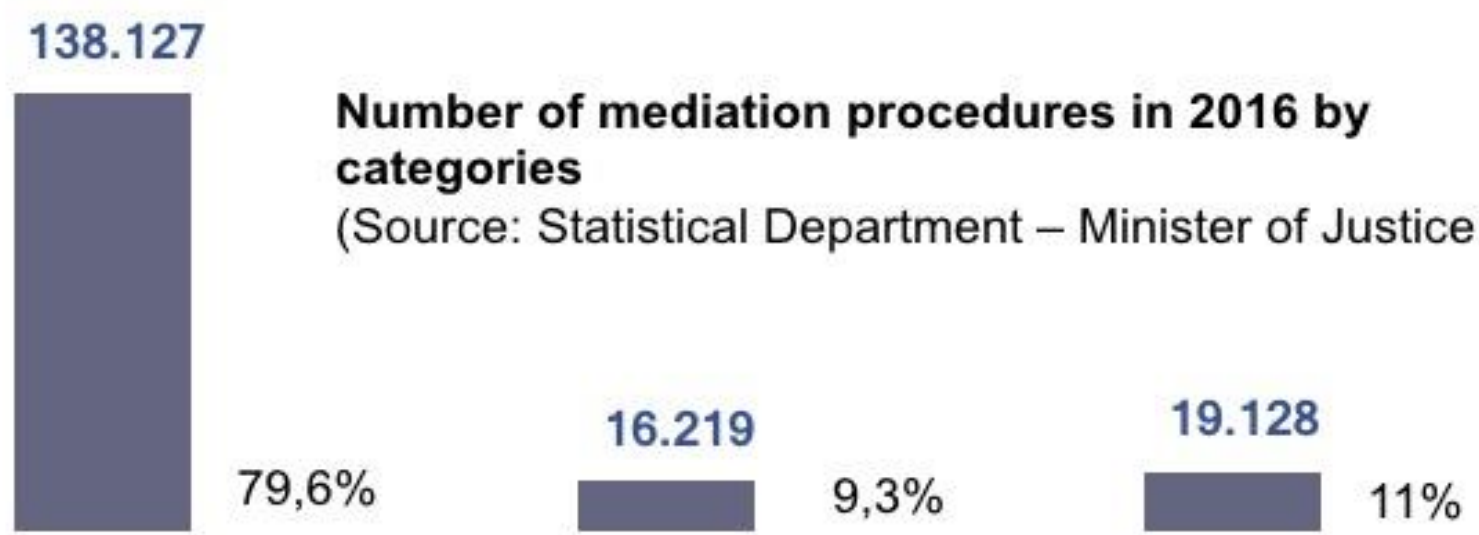
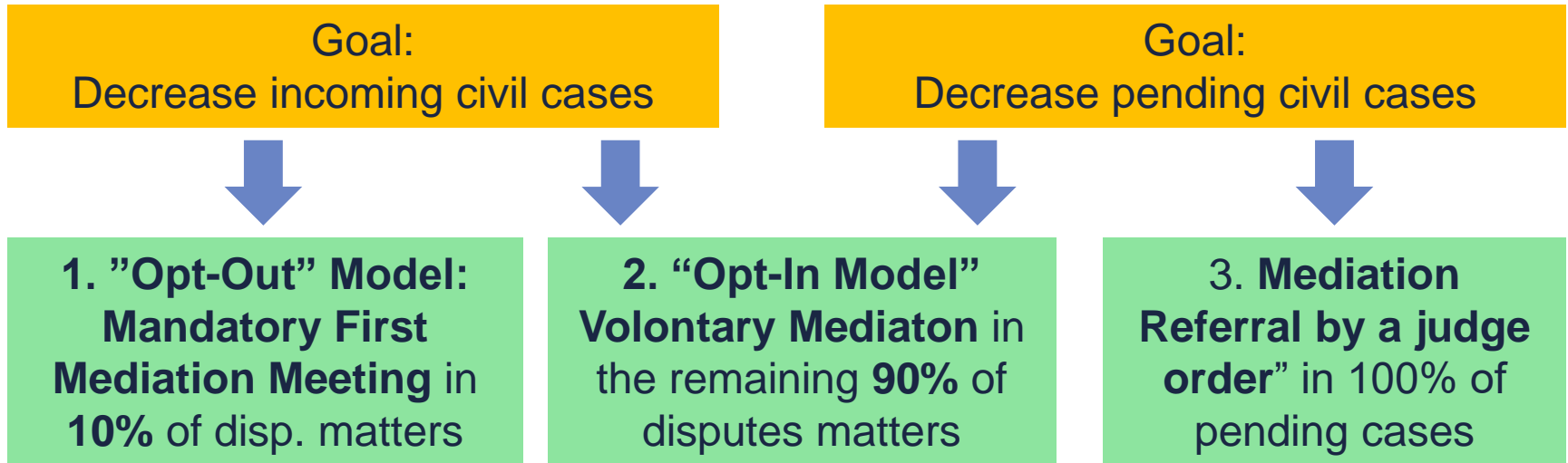
Strasbourg, 12 July 2017

CEPEJ-GT-MED(2017)4-DRAFT

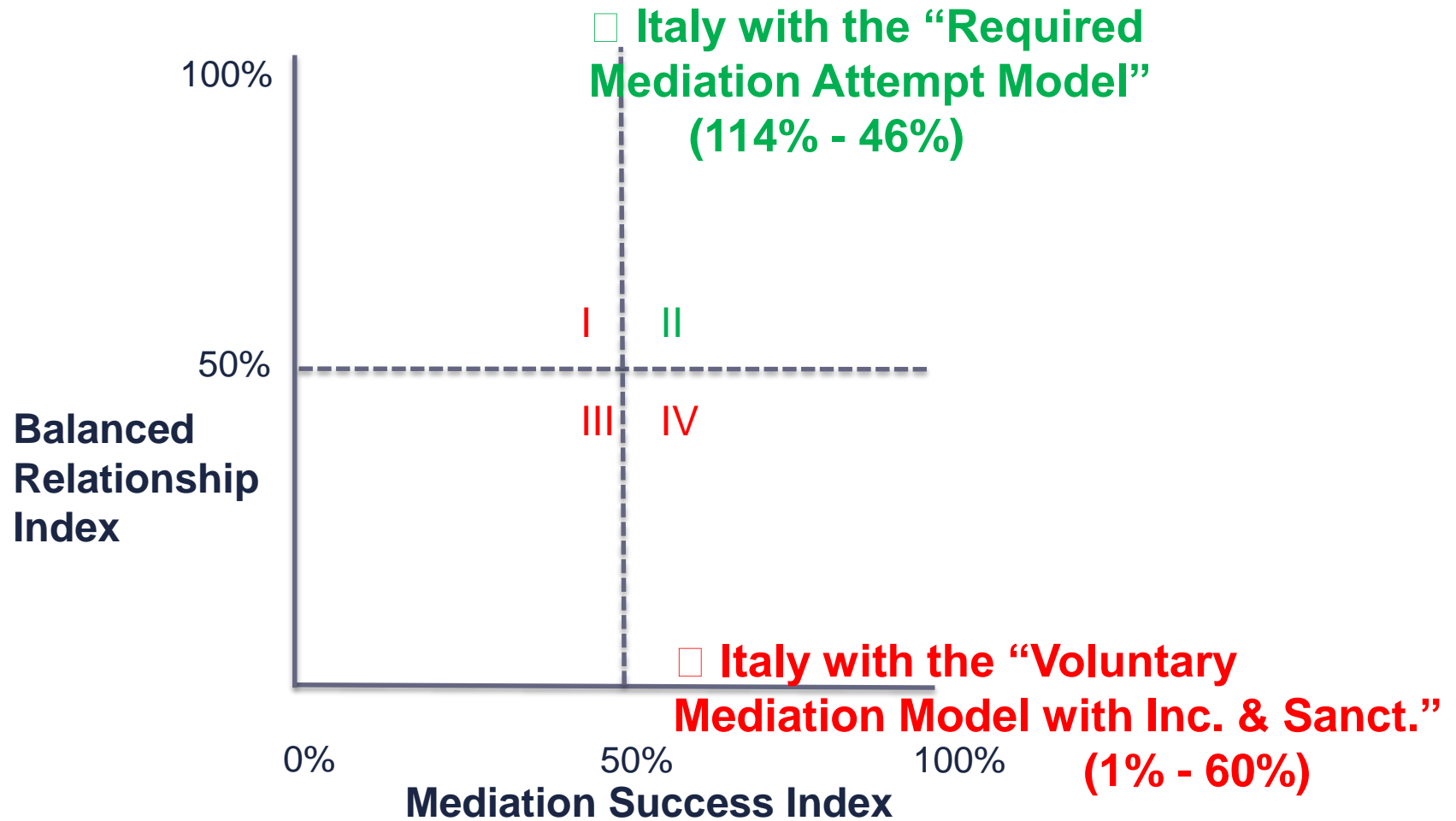
EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ)

After an interruption, the CEPEJ working group on mediation (CEPEJ-GT-MED)[1] has resumed its activities in 2017. During its first mandate, the GT-MED had conducted an impact assessment in the states of the existing Recommendations of the Committee of Ministers concerning mediation, and developed specific guidelines and tools to ensure effective implementation of these recommendations in the Council of Europe Member States[2].

3 MODELS: 3 DIFFERENT RESULTS IN ITALY



BALANCE RELATIONSHIP MATRIX IN ITALY



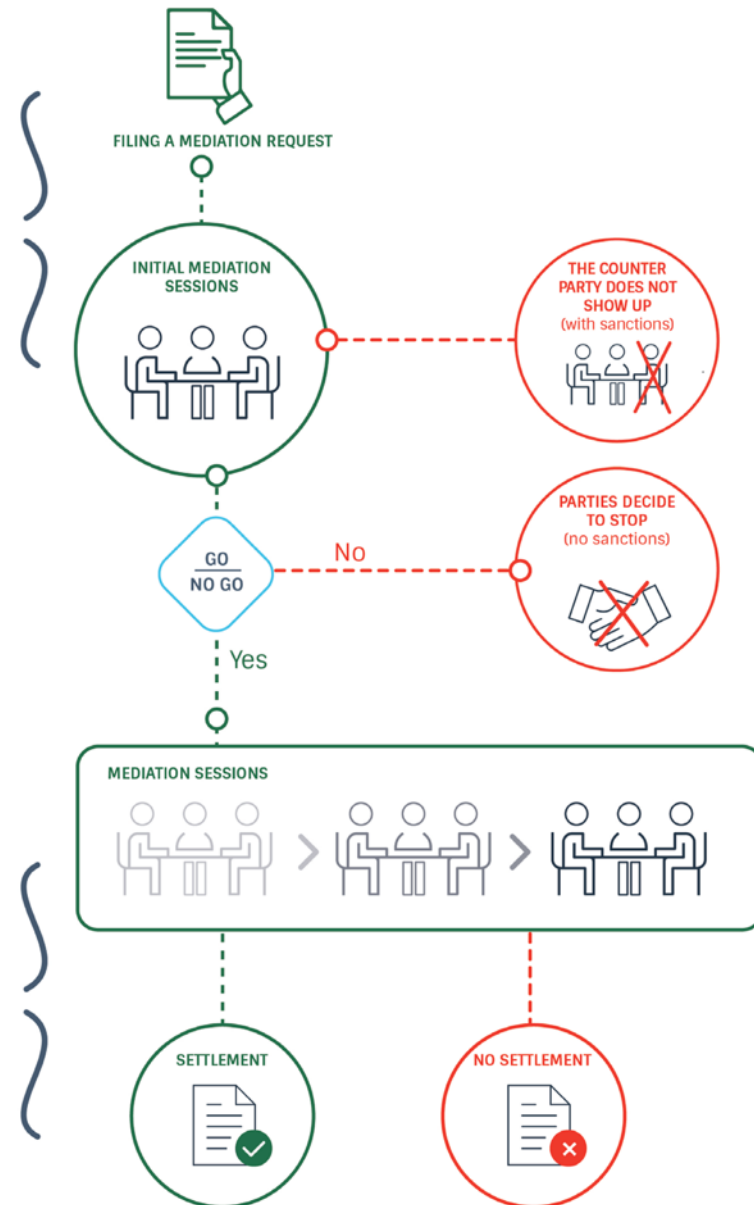
Required Initial Mediation Session

The initial meeting, with the parties and their lawyers before a mediator, is held within 30 days of the date of the filing with the payment of a filing fee of € 40 or € 80.

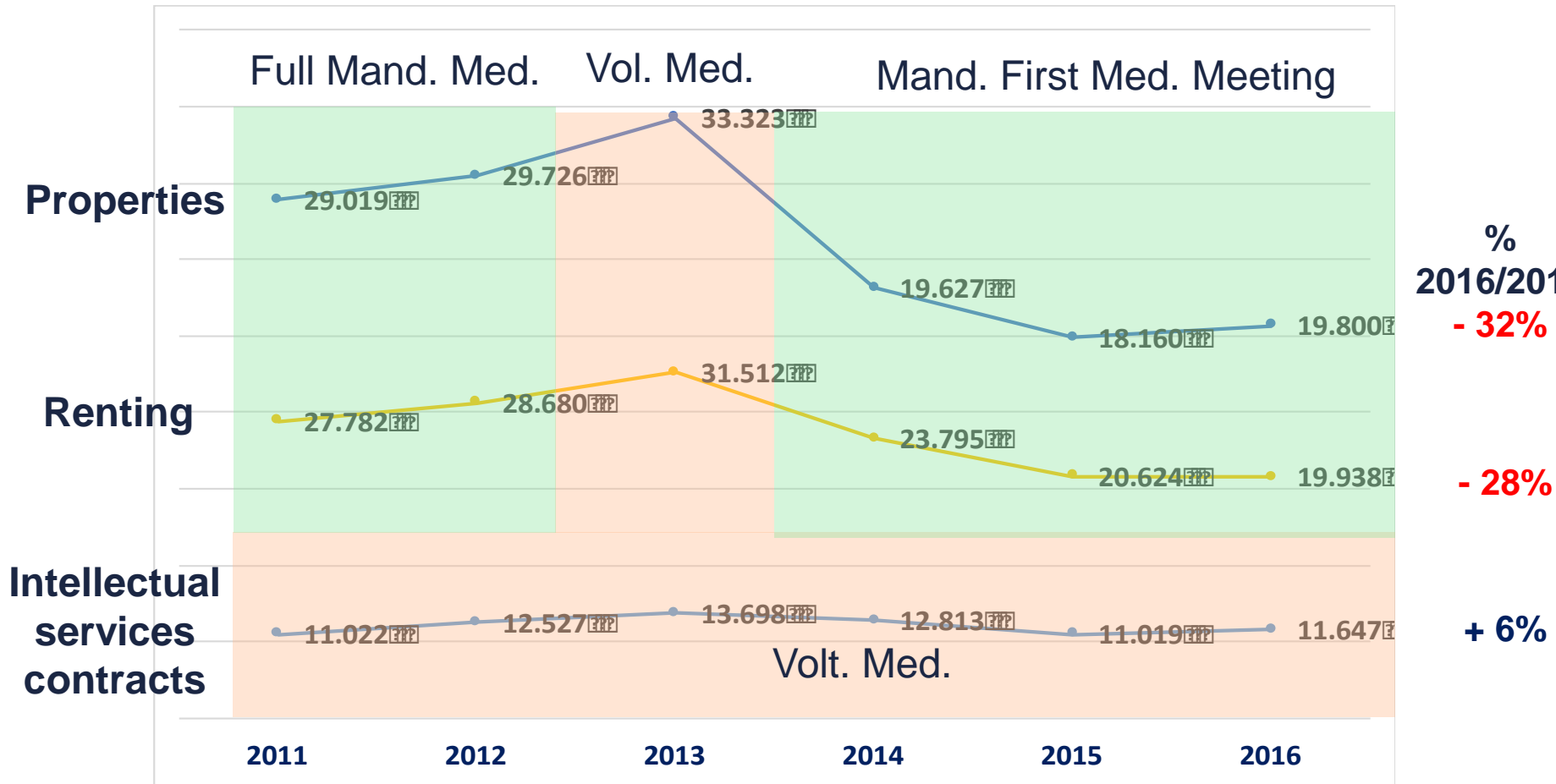
During the initial meeting the parties decide to enter in the full procedure or to stop.

Mediation Sessions

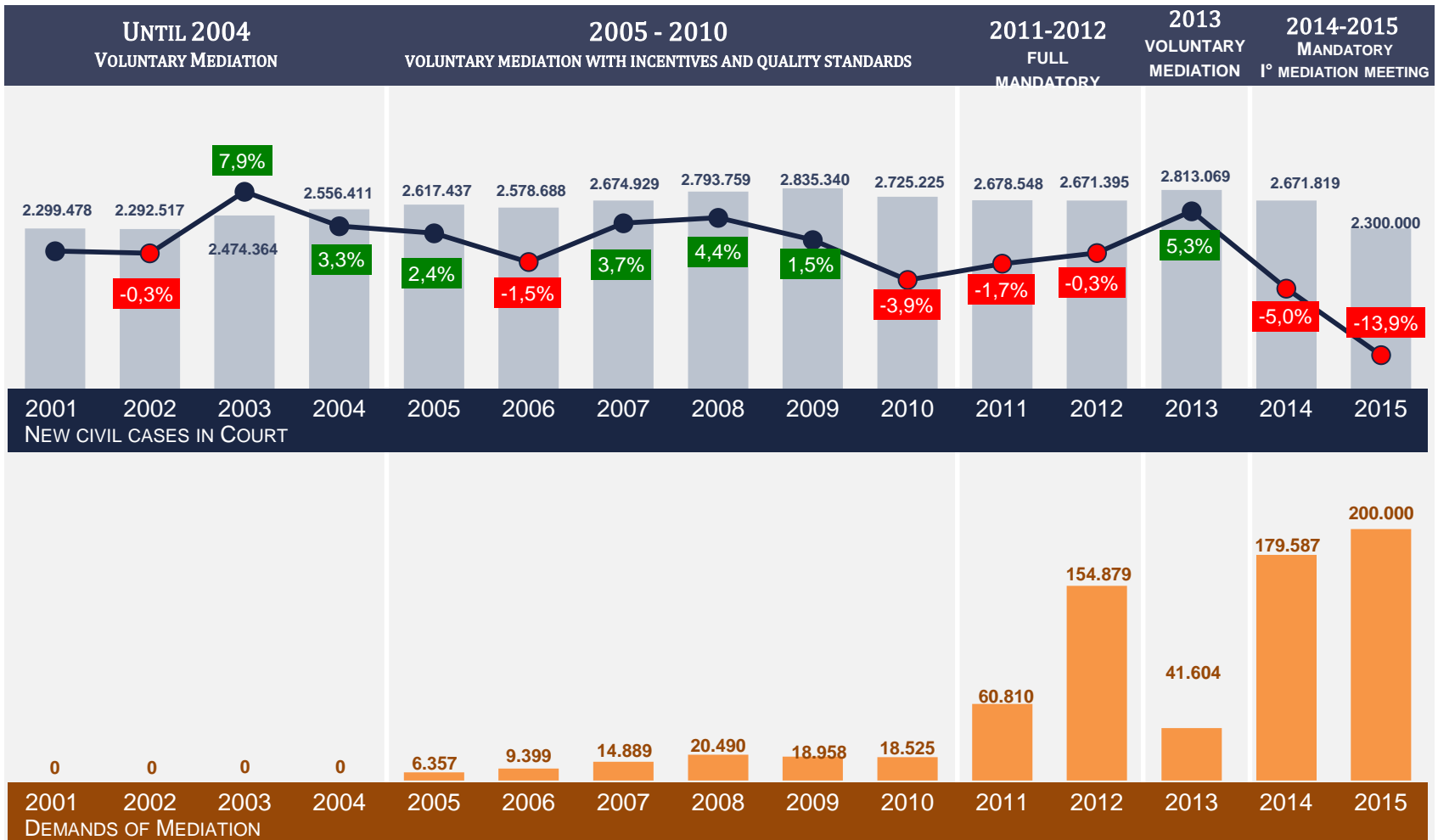
Parties hold one or more mediation sessions within 60 days and pay the mediation fees agreed upon during the initial meeting.



Yearly incoming cases in first instance Court in Italy



The ITALIAN MEDIATION LABORATORY (2001-2017)



Mediation is block to accessing to justice or not?



- European Court of Justice on the “ALASSINI” CASE ON MANDATORY MEDIATION

THE “ALASSINI” CASE OF 2010 (SEC. 65)

“No less restrictive alternative to the implementation of a mandatory procedure exists, since the introduction of an out-of-court settlement procedure which is merely optional is not as efficient ... ”

MEDIATION... (SEC. 67)

- Should not be binding on the parties
- Should not cause a substantial delay
- Should suspend the period for the time-barring of claims ...
- Should be free or very low cost.



JUDGMENT OF THE EU COURT OF JUSTICE

14 June 2017

In Case C-75/16,

Livio Menini, Maria Antonia Rampanelli v Banco Popolare Società Coop.

THE COURT (First Chamber), ...

Judgment

...not precluding national legislation, , which **prescribes recourse to a mediation procedure ... as a condition for the admissibility of legal proceedings**to the extent that such a requirement **does not prevent the parties from exercising their right of access to the judicial system.**

European Parliament
2014-2019



Plenary sitting

27.6.2017

A8-0238/2017

REPORT

on the implementation of 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 (the 'Mediation Directive') (2016/2066(INI))

Committee on Legal Affairs

Rapporteur: Kostas Chrysogonos

Main conclusions

...

- Stresses that all Member States make provision for the **possibility for courts to invite the parties to use mediation or at least to attend information sessions on mediation;**
- notes that, in some Member States, **participation in such information sessions is obligatory, on a judge's initiative**, or in relation to specific disputes prescribed by law, such as family matters....

Lessons learnt in the past 20 years in the EU



- ➔ First index: statistics demonstrates that the “Required Initial Mediation Session” is the **only effective and proven model** that generate can achieve a “balance relationship” and comply with the right of access to justice.
- ➔ Second index: the difference in the success rate (about +/- 25%) depends on the quality of mediators and meditation providers
- ➔ The question is not “**if**” introduce mandatory mediation, but “**how**”: level of “mandatoriness”, in which disputes, in which progression, which sanctions and incentives, which fees, who should administer the mediations...



Thank you

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