

MEDIATION IN ITALY: NEW DISCIPLINE, OLD-STYLE LOGIC

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1. The Constitutional Court's decision and the European Union guidelines – 2.The new discipline – 3.Observations on modifications-

1. It is an irrefutable fact how the Constitutional Court's decision, which censored the implementing mediation measure, formulated by the executive branch of government, in force of Legislative Decree no. 28/2010, for misuse of the delegated power, had disappointed the expectations of both the supporters of such new institute and those who simply intended to put a tombstone on these resolution process disputes.

The supporters of the above mentioned measure are being bitterly disappointed, suffering relevant economic damage. Indeed, relying on that new institute, they had contributed to form organizations, recruit staff, provide costly training courses for participants and deceived young people who were hoping, in accordance with the Government declarations, to find a new path for their careers. Those who opposed the instrument of conciliation, perceived how a lack of radical censorship, preceding from the Constitutional Court, could have pushed towards its re-proposal.

To fully understand the framework, as it emerges from the ruling of the Council, it is therefore appropriate to make some brief references to the issues the Court had been invested with as well as the grounds for the related ruling.

Indeed, beyond the issue of excessive delegation, – highly publicized and absorbent though – other questions had been raised before the Court and particularly those concerning the mediation costs. Mediation was proposed because the borrowing costs constituted a limitation to the access to justice, as they were unreasonable for the causes of lower economic value, and were discriminating against who had to initiate a mediation procedure imposed as a condition of admissibility for the proceeding.

As far as the motivations of the verdict are concerned, our constitutional Judge's decision could be said to consist of two parts: one concerning the European Union law, the other the national law.

Firstly, the Court noted that both the delegation¹ and the delegated² law refer to compliance and coherence with the European legislation³. The legislative decree submitted to constitutional scrutiny is designed as a measure by which the implementation of the mediation directive on civil and commercial matters as enacted by the Council⁴ and the European Parliament is to be carried out.

The Court, in examining the considerations of the Directive noted that, in accordance with Community law, mediation can indifferently be optional, provoked or mandatory. In this latter case,

¹ Art.60, sub-paragraphs 2 and 3, let. c) L. 69/2009, available at <http://www.parlamento.it/parlam/leggi/090691.htm>, accessed 2.9.2014.

² Preamble to D. Lgs. n. 28/2010, available at <http://www.camera.it/parlam/leggi/deleghe/10028dl.htm>, accessed 2.9.2014.

³ The obligation to comply with the restriction related to the Community legal order is provided by art. 117 of the Italian Constitution

⁴ Directive of April 23, 2008 (No. 2008/52/EC), available at <http://eurlex.europa.eu/legalcontent/EN/TXT/?qid=1406528678782&uri=CELEX:32008L0052>, accessed 2.9.2014

provided that the arrangement of the individual State legislation does not prevent the parties from exercising the right of access to the judicial system.

This position has been endorsed by the European Parliament⁵ which in 2011, through two resolutions declared, on one hand, the opposition to any generalized imposition of a mandatory system, in order not to affect access to justice⁶. On the other hand, it noted that the introduction of mandatory mediation into the Italian legal system seemed to reach the aim of reducing the congestion in the courts but, according to the Parliament, this dispute resolution devise should be promoted as a form of alternative justice, faster and cheaper than the ordinary one, rather than being implemented as a mandatory element of the judicial procedure⁷.

Concerning the framework which is going to be outlined, it should not be omitted that the Court of Justice⁸ has excluded the existence of any conflict between European law and the Italian rules of law which require a conciliation procedure between users and network operators and service providers, pointing out that in this case there wouldn't be a clear discrepancy between the results at which that disposition aims and the disadvantages of compulsoriness.

At this point, although the Constitutional Court seems to outline that the EU law allows the other member State to articulate mediation freely, a European model institute is to be delineated in its judgement, which is different from the one carried out by the Government through the law currently subjected to constitutional scrutiny. The Court considers that the European mediation could be mandatory with regards to disputes in which parties have a concrete interest to preserve the mutual legal relationship such as, for example, in family or condominium relations. Still, the Court feels that European mediation would appear as to be under the judge's discretion. With relation to the case presented to him, the judge should examine the opportunity and convenience for the parties to undertake the mediation process.

The other part of the grounds on which the judgement is based examines the national law and particularly the delegating act. The Constitutional Court, with regards to the literal exegesis, makes plain how the intent of the legislature was to delegate the Government to draft a law designing the opportunity to implement the mediation procedure as an alternative device. Briefly, this Parliament's measure is to be intended as a delegation to create an optional and not mandatory mediation. It is also stated that the constitutional legitimacy⁹, declared for the mandatory settlement with regards to the privatized public

⁵ It is also true that European Parliament's resolutions are not binding, only having persuasive force, given the authority such institution has and being the Parliament itself- together with the Council – the author of those acts.

⁶ European Parliament's resolution of October 25, 2011 (2011/2117 Ini), available at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2011-0449>, accessed 2.9.2014.

⁷ European Parliament's resolution of September 13, 2011 (2011/2026 Ini), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0361+0+DOC+XML+V0//EN>, accessed 2.9.2014.

⁸ ECJ, March 18, 2010 (Cases C-317/08, C-318/08, C-319/08, C-320/08). It is quite evident how the Court of Justice's judgments are binding in our legal system too. For an in-depth discussion on such issue see G. Amenta (2001), *La professione forense nell'Italia comunitaria*, Turin, Giappichelli, 2001, p. 44 et seq.

⁹ As above mentioned in the ruling n. 276 of 2000, the Constitutional Court declared the constitutional legitimacy matter of the articles 410, 410bis, and 412bis of the Code of Civil Procedure. as modified, added or replace by the articles 36, 37 and 39 of Legislative Decree no. 80 of March 31, 1998 and the article 19 of the Legislative Decree no. 387 of October 29, 1998 not founded, given the mandatory settlement with regards to the privatized public employment disputes. The decision in comment is available at <http://www.giurcost.org/decisioni/2000/0276s-00.html>, accessed 2.9.2014.

employment disputes, cannot be allowed to become a precedent because that discipline constituted a coherent development of a principle already present in that specific field.

To summarize, the judgement, whilst pronouncing the declaration of unconstitutionality regarding article 5 of the Legislative Decree no. 28/2010, has struck the assumption of mandatory mediation; accordingly, it follows that the entire system of the alternative disputes resolution is not deleted, even if it is not practised voluntarily by the parties in conflict.

The arguments included in the response, in accordance with the objective need for the transposition of the directive, and the inadequate voluntary recourse to such means suggested that, in the near future, a new legislation could provide for a mandatory mediation process, in the same matter or even in other cases.

One last note to outline a comprehensive and clear framework.

The European Union Council has examined the 2012¹⁰ report on the state of implementation of the directive, in order to verify the problems of enforcement met by member States, which actually have proceeded in a random order. The report has pointed out the difficulty in giving cognizance of the degree of implementation carried out, since it isn't easy to obtain verified information neither on the number of mediators nor on the number of mediations carried out, given that the same are often organized and conducted outside the judicial system.

Having entrusted mediation to private bodies outside the judicial system is one of the negative¹¹ consequences of the original intent, on the part of the legislator in certain states such as Italy, to use mediation for the decrease of the judiciary load, forgetting that in reality such new instrument, in the intention of the European legislator, aims at promoting the introduction of an inexpensive and fast alternative system of justice and not of a mandatory element in the judicial procedure.

A further important element will be the Court of Justice's judgement on the preliminary ruling, formulated by some Italian Courts, concerning the mandatory mediation issue in relation to the legal protection right, especially with reference to procedural sanctions for the party who refuses to participate in mediation. It might have been better to wait for the Court of Justice's response¹², before reforming the institute.

2. According to the Legislative Decree no. 69 of June 21, 2013, converted with modifications in the law no. 98 of August 9, 2013 mandatory mediation re-entered into force and further innovations were applied to the Legislative Decree no. 98/2010.

It seems necessary to point out those modifications, even if in brief.

The mediation organism will be identified in relation to the court which is territorially competent to hear disputes and where the first proceedings had been submitted. Therefore, it will no longer be the organism which was applied first in a trial, regardless of the future jurisdiction.

¹⁰ See the 2012 CEPAJ Report pp. 129 et seq., http://www.giustizia.it/giustizia/it/mg_6_6_1.wp?contentId=NOL771675, accessed 3.9.2014.

¹¹ As remarked by the European Parliament in the resolutions referred to in footnotes 6 and 7 of the present article

¹² See footnote 8.

Yet again, as a condition to conduct a proceeding – in one of the matters as referred to in art. 5 of the Legislative Decree no. 98/2010 – mediation shall be carried out in advance. To summarize, matters are unchanged with respect to the previous list and those concerning damage compensation caused by the circulation of vehicles and boats are excluded.

The lawyer – who, as stated in art. 4 of the above-mentioned legislative decree, must inform his client about the admissibility conditions in writing and clearly, under penalty of nullity of the mandate contract, under the combined provision of articles 5 and 8 of the cited Legislative Decree – must necessarily assist the party during the mediation.

The effectiveness of the new institute of mediation is programmed for a period of four years following the date of entry into force. At the end of the first two years of enforcement the Ministry of Justice will monitor the development of the new discipline. A significant modification, according to the second sub-paragraph of the above cited art. 5, is expected in order to provide the judge with the opportunity to carry out the mediation procedure effectively. It will also be the proceedings admissibility condition before the Court of Appeals. In other terms, in this case, the delegated mediation will be mandatory.

The admissibility condition, as stated in the already examined art. 5 sub-paragraph 2 ‘bis’, shall be considered respected even though the first mediation meeting ends without any agreement.

In this hypothesis, according to the provision contained in art.17 sub-paragraph 5 ‘ter’ of the many times quoted Legislative Decree, no compensation would be due to the organism.

After the amendment of article 6 of the Legislative Decree no. 28/2010, the mediation process cannot last longer than three months instead of the four provided in the previous version.

In accordance with art. 8 modification, the fixation of the first appearance should occur within thirty days. This meeting, in the intention of the *novella*, is designed to allow the mediator to clarify features and benefits agreed, so that parties could concretely verify its convenience, this procedure being linked to the availability of the parties themselves and their lawyers.

The already mentioned Legislative Decree, art. 12, has been modified in the sense of making the agreement executive, provided that the parties have signed it with the obligatory assistance of a lawyer. In this case, the lawyers will attest its conformity in compliance with mandatory rules and public order. In all the other cases, the mediation agreement will become executive after the Court’s approval solicited by the party’s instance, as it was in the past.

In force of the cited Legislative Decree, art.16, sub-paragraph 4 ‘bis’, the lawyers have been qualified as mediators by law.

3. Before making some additional comments on the new discipline, it seems appropriate to make some wide-range annotations. Once again, therefore, it is useful to highlight the *ratio* at the basis of the alternative dispute resolution process both at the European and at the national level, as it emerges also from the grounds of the judgement of the Constitutional Court. Just following this consideration, it is possible to estimate the significance in our legal system of the recently adopted legislation.

In the first system, the European one, both the protection of the parties' interests and social pacification are more considered, a faster way to solve disputes involving essentially economical matters, given that a rapid dispute resolution is most useful to the trade in all senses, in order to get an immediate economic advantage, although limited, rather than a more convenient result through a judicial pronouncement in a longer - even if not exorbitant - time.

In the Italian legal system, the legislating institution essentially pursues a particular interest: providing for a deflationary device to deal with the overflowing judicial request; cutting out litigations in order to have quicker proceedings, and thus answering in a more effective way to the request for justice which, if not satisfied, makes the citizen unhappy and humiliated.

Now, following this intention, we do not consider mediation as an adequate solution. Being the Italians a pettifogging people who intend to pursue personal affirmation even if at the expense of any economical benefit, and turn the chronic delays in justice in an indirect financing system, with an exorbitant number of lawyers, the mandatory mediation process will not be able to stop the use of legal disputes in Italy. In our opinion, interventions more focused on the trial process would have a more relevant incidence. Just to give an example, we aim at showing how the unification of the procedures and the first grade admissibility judgement would be more selective as they would eliminate all the manifestly unfounded and unorthodox requests.

It should be stated quite clearly that the alternative dispute resolution is adopted as much as possible where efficient justice subsists. In other words, the debtor, for example, is better to go to mediation finding out a mutually agreed solution when it's positively sure that, within a reasonable period of time, he will be condemned.

From this preliminary consideration, it cannot fail to be noted how the rules that have been introduced by the Reformer in 2013, as we have briefly indicated, stands for confirming how the newly introduced process does not bear at all a new logic and above all it is not able to generate in the user a new approach to the institute, a new attitude towards the alternative dispute resolution method.

To begin with, it must be pointed out that having entrusted mediation to private parties makes the primary objective that the legislator should pursue as difficult as possible to achieve: to lead to consider such regulation as right, shared with the partners, and therefore to be used with confident participation. Indeed, the private, as already mentioned, manages the organism for profit. Now, it seems to be somewhat utopian to believe that there are mediators who, at the first meeting, would devote their energies in making the party aware of the mediation procedure advantages, to verify in a second time that the parties haven't reached an agreement and then, them not being obliged to any payment in favour of the organism, the mediator – most probably – will not receive any compensation.

The organism must be imposed a time restriction, such as three months, in which it should carry out the procedure; but maybe this time limit is still not long enough for the parties to come to an agreement when personnel could be required to opportunely carry out all fulfilments or if there were demanding issues to solve or in the case in which there are more parties. All of this at particularly low costs not fit to give those

profits that the organism's operators are expected to earn.

These elements might affect the quality of the mediators' intervention and the subsequent Ministerial verifications could not succeed in singling out the distortions of such an articulated system, excepting the illegal ones.

In my opinion, another element which is not in line with the idea of mediation as the composition of interests and not as the protection of rights is having made the lawyer a mediator, by law.

The Lawyer, due to his acquired culture, will be mostly inclined to examine the matters submitted to him in terms of the rules of law; without any adequate competence he will be unable to evaluate with caution, for example, those fundamental psychological aspects that are crucial in making mediation a shared agreement. Following mainly the rules of law, in order to solve the conflict, will turn the mediation system into a fourth degree of trial justice, an obligatory step in front of a lower-ranking Judge. The mandatory legal aid, furthermore not considered at a European level, makes that distortion as concrete as possible, abjuring the spirit which animates the institute.

The lawyer's cost having become mandatory, and weighing on the assisted party is the perfect legislator's finishing touch making mediation even more difficult.

I do not think that having disposed a time-limited mediation, declaring overtly the intention of testing it, is the better way to promote a convinced approach to it. On the contrary, it confirms diffused precariousness feelings and uncertainty related to the legislator's issue. Nor the verification after a period of two years will provide any significant data. If you examine the impact on the proceedings, they will certainly be decreased but not thanks to the definition of a relevant number of disputes by means of a mediation agreement.

The data we can obtain from the first hypothesis of application of the mediation are not encouraging, the new proceedings reduction between 2010 and 2011 is very restrained and it is part of a trend started in 2007, highly related to the economic crisis rather than to the mediation supposed beneficial effects.

In my opinion, there are two remarkably positive elements of the new regulation that deserve to be highlighted.

The first concerns the possibility that the agreement signed up by the contracting parties and their lawyers will constitute the document of execution for bound mediation matters. The transition to the Court's typed approval was a further burden on the parties, with undue costs. Maybe lawyers, given the way their professional responsibility is outlined, will encounter some difficulties in drawing up the settlement agreement, unless they do not notice the contrast concerning the mandatory or otherwise public order rules.

A further positive element is having transformed mediation from delegated to mandatory. I refer to the hypothesis in which the judge deems appropriate to solicit the parties to mediation. Indeed, the previous draft of the rule stated that "the judge may invite the parties" to attempt mediation, while currently it states that "the judge may perform the necessary formalities in the attempt to reach mediation". This difference in wording made the parties unable to decline the judge's invitation and ask him to continue the proceedings. Today it has become a new admissibility condition.

However, if the judge, having weighed at what stage are the matters in court, the nature of the issues and the behaviour of the parties, disposes to mediation, he will have obviously considered how it is more profitable for both opposing parties to appeal to mediation rather than a judicial dispute resolution, in terms of solutions, time limits and costs.

It is essential in this respect that the judge shall be animated with a great sense of balance, assess the advantages the parties could get from mediation, and not appeal this device simply to lighten his own case list. Whereas the judge will be able to manage the power he has been entrusted with, he will assume a strategic function as he will be able to carry out the essential work for the effective introduction of this new methodology: spreading among the citizens the non-judicial dispute resolution culture and making them appreciate the undoubted advantages that such a device can offer. In compliance with the legislative provision, it would be appropriate for the judge to formulate a proposal which may also be justified, even if not required, to make the parties aware of its convenience in a more effective way¹³.

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In this sense we highlight the twin ordinances issued by the Tribunale di Roma, sez. XIII, 23.9.2013, available at www.adrmaremma.it/news132.pdf, accessed 2.9.2014.