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Directive 2008/52/EC: Italy's Peculiar Implementation and its Consequences on Cross-Border Civil and Commercial Disputes

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1. Subject of my presentation is mediation, that is a dispute resolution instrument, alternative to court proceedings, which has recently caught the attention of the European Union, hence of its Member States (hence of Italy).

It is known how the EU (in line with and on impulse of other extra-European and international experiences) has progressively grown an interest towards mediation.

The reasons of such worldwide and European attention are not unknown. Indeed, mediation has been considered an effective alternative to court proceedings in dispute settlement: from a worldwide perspective, in favouring a more uniform resolution of cross-border disputes; and from an European perspective, in guaranteeing that Genuine European Area of Justice which the 1997 Amsterdam Treaty and the 1999 Tampere Council have set as a necessary condition to create a common market, hence to make free circulation of persons, goods and services possible within the EU.

As a process (so traditionally defined) where two or more parties to the dispute voluntarily try to reach an agreement in order to resolve such dispute with the assistance of a mediator (as in Art. 3 (a) of the Directive 2008/52/EC), mediation indeed seems to be able to solve the many and controversial issues raised by cross-border disputes (often an obstacle to the effective achievement of a common global market), which are: on the one hand, the identification of the law applicable and of the jurisdiction competent to decide the case; on the other hand, the fact that each State has its own judicial system and procedures. Mediation is a process set on a strictly voluntary basis and

aimed at enhancing not as much the legal qualification of the dispute, but the parties' individual interests; indeed, the mediation centre competent for the dispute and the law applicable to it are not established in advance, thus overcoming the issues raised by jurisdiction and conflict of law rules.
This is why the institutions considered the mere imposition of some minimum procedure requirements to mediation centres as a guarantee sufficient to the simplification and uniformity of cross-border dispute settlement, thus of great benefit for both European and global commerce.
Indeed, a more careful analysis would be needed in order to establish whether this is the best way to find an answer to the increase of worldwide economic and legal relationships, as well as to the new shape of civil dispute is morphing into. However, I have a few reservations on the institutional choice to blindly prefer mediation to court proceedings in order to favour global commerce.
Critical considerations aside and back to the European context, it has to be noted that the EU has also been progressively taking into consideration the instrument "mediation": after a long debate, the EU issued the Directive 2008/52/EC on certain aspects of civil and commercial mediation. This Directive has established some minimum requirements on cross-border civil and commercial mediation that all Member States have to comply with.
The aforesaid Directive should have been enacted by Member States within last May: also Italy complied with such obligation with the *Decreto Legislativo* (Legislative Decree) 4 March 2010, No. 28, headed "Mediation Aimed to Settling Civil and Commercial Disputes", which came into force (at least in part) already in March 2010 (from thereon the "D.lgs. No. 28/2010")
To D.lgs. No. 28/2010 followed the *Decreto Ministeriale* (Ministerial Order) 18 October 2010, No. 180, which enacted the parts that D.Lgs. No. 28/2010 had voluntarily left to be disciplined by ministerial departments.

2. After this brief foreword, my presentation will focus on the following considerations: on the one hand, with regard to the peculiarities of the Italian implementation of the Directive 2008/52/EC, where "peculiarity" means the "strained interpretation" of mediation given by the Italian legislator; mediation as interpreted by D.lgs. No. 28/2008 is not "mediation" as traditionally considered, but an instrument with which to induce the parties to accept an offer of settlement made by a mediator in order to avoid in-court proceedings; on the other hand, with regard to the aftermath of this Italian "strained interpretation" on cross-border disputes. My presentation will then be structured in a (first) part which is critical towards some sections of the Italian law on mediation and is aimed at warning foreign scholars and legal practitioners on the consequences of the "peculiarities of Italian mediation" in case of cross-border dispute brought before an Italian mediation centre; and in a following (second) part which, in light of the critiques developed and of the confrontation allowed

by this worldwide setting, acknowledges the importance of mediation as an instrument disciplined in conformity with the right to a full and effective access to justice; mediation is therefore understood as a means of dispute settlement which is merely complementary and does not substitute court proceedings.

3. Investigating the "peculiarities" of the Italian discipline on mediation in civil and commercial disputes requires a brief introductory analysis of the main features of D.Lgs. No. 28/2010, which (it is good to remember) deals with both domestic and cross-border mediation.
Interesting aspects (mainly in order to identify the aforementioned "peculiarities") are:

(a) the definitions given by D.Lgs. No. 28/2010. According to its Art. 1:

- *mediation* is the "activity, however called, carried out by an impartial third party and aimed at assisting two or more parties in both researching an amicable dispute resolution and formulating an offer in order to settle such dispute" (lett. a);
- *conciliation* is "the settlement of disputes resulting from a mediation process" (lett. c): the conciliation is therefore the result of a mediation;
- *mediator* is "the natural person or persons which, individually or collectively, carry out mediation, in any case lacking the power to issue judgments or decisions binding for the parties making use of their services" (lett. b).

(b) the provision of *compulsory mediation (on the parties' expenses)* in an extensive number of disputes, that is an attempt to mediation as a condition of admissibility of the claim to a court (Art. 5, sec. 1, which exhaustively lists which disputes are to undergo the compulsory attempt to mediation).

(c) the *three different epilogues* of mediation assumed by the Italian legislator. Briefly, they can be:
0. one of the parties does not take part to mediation process: the mediator puts on record the fact that one of the parties has not taken part in the mediation; the failure to take part in the mediation process "without just cause" may have negative effects on the evaluation of evidence by a court in subsequent proceedings (Art. 8, sec. 5);
I. the *reaching of a conciliation agreement between the parties*: the mediator puts on record both the parties' intention to reach an agreement and the agreement itself; the record is then signed by the parties and the mediator (Art. 11, sec. 4 first sentence);

II. the *parties don't reach a conciliation agreement* (Art. 11, sec. 1-5). In this case, there are three possibilities:

a) the mediator *must* make an offer of a conciliation agreement to the parties, if they jointly ask him to do so;
b) the mediator **can** make an offer of a conciliation agreement to the parties, warning them on the adverse consequences of a refusal of such offer (mainly on the prejudicial effects with regard to the litigation costs, which the parties could be ordered to pay by the court if they start a court proceeding after refusing of the offer).
   The mediator then puts the offer on record, indicating whether the parties accept or refuse it.
c) the mediator puts on record the failure to reach a conciliation agreement.

4. After having outlined some features of the Italian discipline on mediation, it is now possible to identify its "peculiarities": such are the elements which move "Italian-style" mediation away from the traditional model of mediation defined in Art. 3 lett. (a) of the Directive 2008/52/EC, hence distorting the relationship between mediation and court proceedings and making the first just a means to draw disputes away from the latter.

(a) First of all, *mediation is compulsory (and on the parties' expenses) in an extensive number of disputes*.
Constitutionality issues aside, our legislator shows negligence in failing to carefully check what type of disputes could be "appropriate" to mediation (at least theoretically). On the contrary, the impression given by the long (and indistinct!) list of disputes subject to compulsory mediation is of an intentional diversion towards mediation of as many disputes as possible, so to draw them away, at least temporarily, from (congested) domestic courts.

(b) Secondly, there is the *duty/power of the mediator to make an offer* to the parties when the mediation did not result in conciliation, that is when the parties did not reach voluntarily a conciliation agreement, not even with the mediator "promoting dialogue".
The effects of an offer made by the mediator are very serious.
When the *mediator's offer* is not accepted, such offer has to be *put on record*, such *record* can be acquired (on petition of the party or *ex officio*) *during subsequent proceedings* eventually brought in front of the court; and the *court* can *take it into account* in order to compare the content of the (refused) offer with the judgment: if the mediator's offer corresponds to the judgement, the judge penalises the party who refused the offer (even though they are the winning party) ordering them to

pay the *litigation costs* (Art. 13, sec. 3). The (even winning) party who refused the mediator's offer runs the risk of not recovering the trial cost, if the content of the offer corresponds to the judgment.
Some brief remarks must be made on this last issue.
Directive 2008/52/EC, at its Art. 5, sec. 2, "leaves national legislation free to make mediation subject to sanctions both before and after the beginning of judicial proceedings"; however, according to this very same Art. 5, sec. 2, such sanctions are admitted "as long as domestic legislation does not prevent the parties from accessing judicial proceedings" as guaranteed by Art. 6 of the European Convention on Human Rights and Art. 47 of the Charter of Fundamental Rights of the EU.

After a careful analysis of Art. 5, sec. 2 of the Directive it is understood how the Italian implementation is to be considered at least "peculiar".
Indeed, there are serious doubts, on the one hand, with regard to the confidentiality of the information gathered during the mediation process (confidentiality which is, still blandly, guaranteed by Art. 7 of the Directive); on the other hand, with regard to the fundamental right to access to justice.
As to the first issue, the mediator, in recording the offer, could mistakenly refer to information and statements made by the parties during mediation proceedings, which would then be known by the court in subsequent in-court proceedings in case such mediation fails. It is clear how this would be completely against the concept of mediation as a process which guarantees confidentiality.
As to the respect of the fundamental right to access to justice, the doubts are even more serious. The negative consequences of refusing a mediator's offer on the allocation of litigation costs in the subsequent proceedings (started in front of the court after the failure of the mediation) makes clear, indeed, how access to justice in Italy runs the risk of being guaranteed formally, but not substantially.
This is why the choice of the Italian legislator in regulating the instrument of mediation and its relationship with in-court proceedings is strongly criticised by both scholars and even legal practitioners.

5. Directive 2008/52/EC does not mention that an offer made by the mediator, if refused, shall have an aftermath (with regard to litigation costs) on the outcome of subsequent court proceedings once the mediation process has failed. Yet, the "peculiarity" of the Italian choice did not come from nothing.

From a comparative perspective, an analysis of the experiences (including extra-European experiences) which could have influenced the Italian legislator in establishing the possibility for the mediator to make an offer (which can be refused by the parties, but with the risk of being subject to a sanction during further proceedings), brings into consideration two Anglo-American instruments: the *Offer of Judgment* (*OJ*) and the *Early Neutral Evalutation* (*ENE*). Indeed, both instruments display some similarities with the Italian rule of the offer made by the mediator, as well as important differences: even admitting that the Italian legislator was influenced by such instruments in establishing the "offer of settlement made by the mediator and subject to sanction", such offer is anyway to be considered a true *novum*, not to say (considering its deleterious consequences on the success of mediation in Italy) a *monstrum*.

Below will be analysed the essential features of the *Offer of Judgment* and of the *Early Neutral Evaluation*, so to highlight their analogy, but especially their differences, with the so-called "offer of settlement subject to sanction" made by the Italian mediator.

(a) As known, the *Offer of Judgment*, contained in the U.S. *Federal Rules of Civil Procedure* as well as also (even though with some differences) in the Canadian *Federal Courts Rules* and in the English *Civil Procedure Rules*, is an offer of judgment made by the defendant to the claimant before trial begins: the claimant may refuse such offer, but where the judgment obtained from the court is as advantageous, or less advantageous than the offer made, the court will order that the defendant is entitled to all litigation costs from the date of the offer.

There are clear similarities between the *Offer of Judgment* and the "offer of settlement made by the Italian mediator": they both consist of an offer of settlement made before trial which, if refused, will be taken into account by the judge in awarding costs. However, the differences between those instruments are more important than the analogies.

In the *Offer of Judgment*, indeed, one of the parties (not a third party) makes an offer and this offer, introduced within the context of in-court proceedings which have already started (therefore the claim has already been analysed both in fact and in law), is shaped as a potential judgment: from here, the possibility for the judge, in case the offer is refused, to compare its content with the final judgment.

Italian mediation does not operate in the same way: the offer of settlement comes from the mediator further to a mediation process where the mediator's task is not to analyse the facts of the claim and apply the relevant law, but to bring out the contrasting interests of the parties in order to find voluntarily an agreement. In this context (which is completely different from in-court proceedings), how could the mediator's offer be comparable (as in the *Offer of Judgment*) with a judgment issued by a court further to proceedings started once the mediation has failed?

Similar considerations emerge from a comparison between the *Early Neutral Evaluation* (*ENE*) and the "offer of settlement subject to sanction" made by the Italian mediator.

(b) As known, the *ENE* consists in a non-binding evaluation of the parties' claims, defences and evidence made by a third party (the evaluator), on the parties' request, in order to obtain a "reality check" of the claim also with a view to settlement.

As the *Offer of Judgment*, the *ENE* also displays interesting similarities with the "offer of settlement subject to sanction" made by the Italian mediator: firstly, they both come from a neutral third party further to a confidential session between the parties and the third party, where the first explain informally (that is, without the formalities required in judicial proceedings) their reasons; secondly, both *Offer of Judgment* and *ENE* can bring towards the settlement of the dispute. However, there are strong differences between the two instruments. The *ENE* evaluator is always a lawyer with expertise in the substantive legal area of the dispute (where the Italian mediator does not need to have such expertise), who gives an opinion on the issue in order to assess the likelihood of liability of one party; however, the evaluation stays confidential. The prohibition to disclose the *ENE* evaluation to the court deciding on the claim if there is no settlement is part of the Anglo-American tradition; that is to avoid the court being in any way influenced by the outcome of the *ENE* evaluation. The offer of settlement made by the Italian mediator has a regime opposite to the *ENE* evaluation, because, as seen above, if refused it can be admitted (on petition of one of the parties or *ex officio*) during further proceedings, and can be taken into account by the court in awarding litigation costs.

6. After describing the "peculiarities" of Italian mediation, let us now lead on to analyse their aftermath on cross-border disputes. In other words, which consequences of such "peculiarities" must scholars and practitioners, also foreign, be aware of when they find themselves dealing with a cross-border (civil or commercial) dispute, in particular with one having connections (also) with the Italian legal system?

Limited to what said above, these are the two warnings worth making.

(a) First of all, a warning to the person resident abroad and involved in a cross-border dispute connected to the Italian legal system, who intends to issue a claim in front of an Italian court. Briefly, such person will have to check on whether the dispute is included among the ones subject to compulsory mediation in Italy according to the aforementioned D.Lgs. No. 28/2010.

If that is the case, the person shall attempt mediation before bringing the claim in front of the Italian court. As said above, indeed, such attempt is a condition necessary to the admissibility of the claim to the court.

(b) Secondly, another warning to the foreign person involved in a cross-border dispute, as a claimant or defendant, in front of an Italian court, after the failure of an attempt to mediation carried out in a mediation centre registered in Italy. Such person must be aware that, if during the mediation process the mediator has made an offer of settlement which has been refused by the parties, the Italian court could take that into account when deciding on the litigation costs. If the content of the mediator's proposal (entirely) corresponds to the judgment, the court, according to the aforementioned D.Lgs. No. 28/2010, could penalise the party who refused such offer, even if that is the winning party, ordering them to pay litigation costs.

It is therefore understood how a few questions arise in respect of the "peculiarities" of Italian mediation and their effects prejudicial to the parties' access to justice: there are doubts on the conformity of this discipline to Directive 2008/52/EC as well as to the actual competitiveness of Italian mediation in an international context. With regard to this last point, indeed, there is a risk that the parties involved in a cross-border dispute avoid Italian mediation centres because of the prejudicial effects they could be subject to by the court if the mediation process fails, or avoid bringing the claim in front of an Italian court once the attempt to mediation has failed (it could also happen, but that would be an unfortunate result, that the parties turning to Italian mediators and then courts are the most ill-intentioned which, to the detriment of the other party, want to take advantage of the possible prejudicial effects stemming from the refusal of a mediator's offer).

In light of the above, it is clear how desirable it would be for the current Italian discipline to be reviewed. Both academics and mediation specialists (as to advance a future review by the legislator), suggest to mediators to be extremely careful (if not reluctant) in making and putting on record an offer of settlement for the parties.

Indeed, the mediator could make two different types of offer, which could both display negative effects. One is the "adjudicative proposal", with contents similar to a draft judgment, so to enable the court to compare the offer with the judgment entered: such type of offer would be difficult to make, as the mediator does not access the facts and evidence of the case neither applies the law; in any case, even if made, an "adjudicative proposal" has the effect of perverting the instrument of mediation, which is traditionally indented as an instrument aimed at facilitating dialogue between the parties, not at deciding who is right and who is wrong.

Alternatively, the mediator could make a "facilitative proposal", which is aimed at settling the parties' interests beyond the facts of the case and the law applicable: however, in this case, once the proposal has been rejected by the parties and proceedings have started, the court would not be able to compare the contents of its judgment with the offer made by the mediator.

For the aforementioned reasons, it is better for the Italian mediator to refrain from making an offer to the parties (or, at least, to refrain from putting such offer on record). This reluctance in making an offer of settlement will advantage, together with the fundamental right to access to justice, also the competitiveness of the Italian legal system in a worldwide context.

7. Moving from the Italian experience to a more general perspective, some final remarks find now space.

The description of the "peculiarities" of Italian mediation has highlighted the most evident reasons of the Italian legislator. Indeed, it is clear that the choice of compulsory mediation on the one side and of a mediator's offer of settlement subject to sanction on the other side have mostly one and ill-concealed aim: among the many functions performed by mediation, the Italian legislator intends to privilege its potential as an instrument to reduce in-court disputes.

As a matter of fact, this potential of the mediation has been appreciated by all legal systems; however, it should be said that this potential seems to have been considered too favourably by the Italian legislator, who hoped to find an easy *panacea* to another (rather sad) Italian "peculiarity": that is, the renown excessive length and slowness of Italian in-court proceedings, which is keeping courts at a stake.

Nevertheless, in my opinion, this should not be the only aim to be taken into account by the legislator in regulating mediation, as doing so would impoverish the possibilities of settling a civil disputes; mediation should instead be made capable to enrich such possibilities by increasing the options of solving disputes.

Just dialogue and comparisons among legal systems could be used as an instrument to control such dangerous trends, as shown by the importance and outcome of events like the one we are carrying out today. Indeed, only dialogue and comparison among legal systems can help in configuring a mediation which is concretely capable of improving the resolution of civil disputes; and to be so, in my opinion, mediation is only conceivable as an instrument complementary to access to justice, never substituting to it or effectively limiting it.