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"*Italian Mediation Law is all right*" – the European Court of Justice said !

European Court of Justice, in Case C-75/16, judgment of 14 June 2017 [1]

6 . " *... 'mediation' ... a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.*

61 . " *... the requirement for a mediation procedure as a condition for the admissibility of proceedings before the courts may prove compatible with the principle of effective judicial protection, provided that that procedure*
- does not result in a decision which is binding on the parties,
- it does not cause a substantial delay for the purposes of bringing legal proceedings,
- it suspends the period for the time-barring of claims
- it does not give rise to costs — or gives rise to very low costs — for the parties
and only if
- electronic means are not the only means by which the settlement procedure may be accessed
- interim measures are possible in exceptional cases where the urgency of the situation so requires (see, to that effect, judgment of 18 March 2010, Alassini and Others, C-317/08 to C-320/08, EU:C:2010:146, paragraph 67).

70 . " *... the Italian Government declared that the imposition of a fine by the court in subsequent proceedings is provided for only in the event of failure to participate in the mediation procedure without a valid reason and not in the event of withdrawal from it. If that is the case, which it is for the referring court to determine, Directive 2013/11 does not preclude national legislation which entitles a consumer to refuse to participate in a prior mediation procedure only on the basis of a valid reason, to the extent that he may bring it to an end without restriction immediately after the first meeting with the mediator.*

" ***Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which prescribes recourse to a mediation procedure, in disputes referred to in Article 2(1) of that directive, as a condition for the admissibility of legal proceedings relating to those disputes, to the extent that such a requirement does not prevent the parties from exercising their right of access to the judicial system.***

" ***On the other hand, that directive must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides that, in the context of such mediation, consumers must be assisted by a lawyer and that they may withdraw from a mediation procedure only if they demonstrate the existence of a valid reason in support of that decision*".**

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[1] http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d54ec64e37fe3d4dc78a929e82caa260c5.e34KaxiLc3eQc40LaxqMbN4PaxmSe0?text=&docid=191706&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=620578

Even if there is not an archetype for mediation, nevertheless there are some common features. Mediation is an
- informal procedure with the obligation of confidentiality
- voluntary and not enforceable
- available to the parties, who are always present
- not linked to the judicial proceedings
- managed by a neutral (keen in communication techniques)
- with no compulsory assistance by lawyers to the parties
- focused on intests and not on the right (even if always in the shadow of it)
- and with a possible final agreement reached by the parties themselves.

Italian commercial mediation (in force since 2011), instead, is an
- informal procedure with the obligation of confidentiality
- voluntary (and enforceable) and compulsory (and enforceable)
- available to the parties, who too often are not present
- linked to the judicial proceedings
- managed by a neutral (who should be keen in communication techniques, usually in law)
- when mandatory, with the compulsory assistance by lawyers (too many times representing the absent parties in the proceeding)
- focused on interest and not on the right
- with a possible final agreement reached by the parties themselves
- with a possible written proposal by the neutral, when asked by the parties, or on his own initiative and also even if one of the parties is missing (it is hard to conceive of a mediation with a missing party !!!), which could have consequences on court expenses;
- litigants are only required to meet the meditor for a first information meeting, pay a 48,80 euros fee, and "**OPT-OUT**" the decision starting a full-blown mediation (in any case, no expense for the State).

Therefore, which kind of civil and commercial mediation is the Italian one ? [2] .

"*Italy, actually, features a 'mitigated' mandatory mediation system. Indeed, in certain categories of cases litigants are only required to sit down with a mediator for a preliminary meeting, at no cost, in lieu of having to go through, and pay for, a full-blown mediation. If any of the parties is not persuaded that mediation has good chances to succeed, they can 'opt-out' from the process during the preliminary meeting and go directly to court without negative consequences. Amongst other advantages, this model reduces to the minimum concerns about the litigants' right of access to justice*" [3] [4] .

There are three principles established by the Court of Justice of the European Union :
- the obligation to mediate is compatible with the access to justice provided that it complies with the principles already ruled by the Italian law;

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[2] Matteucci Giovanni, "*E non chiamatela mediazione ! And do not call it mediation !* " 11.12.2013 http://blogconciliazione.com/2013/12/e-non-chiamatela-mediazione-anche-perche-ha-una-funzione-paragiurisdizionale/

[3] European Parliament, Directorate General for internal policies, Policy department citizens' rights and constitutional affairs, Legal Affairs, "*Rebooting the mediation directive*" pag. 6 and 8, 2014 http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493042/IPOL-JURI_ET(2014)493042_EN.pdf

[4] Canessa Romina and D'Urso Leonardo. "*The Italian Mediation Law on Civil and Commercial Matters*", March 2017, http://www.mondoadr.it/wp-content/uploads/The-Italian-Mediation-Law.pdf

- the presence of the lawyer is not mandatory in consumer vs. professional disputes;
- the consumer may refuse to participate in a mediation procedure only for a justified reason, provided that he can retire after the first meeting with the mediator (as already required by the Italian law).

In other words :

- the civil mediation regulated by the Italian law does not begin with the filing of the application (although some effects occur from that date) but with the overcoming of the first information meeting (take note of it in relation to the confidentiality obligations and the content of the minutes of the proceedings, if you do not go beyond the preliminary meeting [5]);
- the mediation starts after the first information meeting; if the party does not want to continue, can any proposal by the mediator (not required by the parties, but allowed by the law), which might have consequences on court expenses, be compatible with the European legislation ? I do not think so.

The tool works, it is efficient but underutilized :

- when all parties met with a mediator and decided to go further than the first information meeting, the rate of success was 43% in 2016; but, taking account also of the proceedings where parties decided not to go further than the first meeting, the overall rate of success was 11%; too low, even if a bit higher than in previous years;
- the conflicts subjected to civil mandatory mediation are only the 8% of all the conflicts filed in the Italian courts; the filing of all civil cases increased by 10% between October 2012 and September 2013 (when mandatory mediation was revoked) and decreased by 15% later on (when mandatory mediation was reintroduced);
- 2016 scored the highest number of civil mediation agreements ever reached: 20,237 (out of 183,977 proceedings) [6] .

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[5] Matteucci Giovanni, "*Verbale di mediazione in caso di rifiuto a proseguire oltre il primo incontro: 'non vedo, non sento, non parlo' o qualcos'altro?*", MondoAdr 30.10.2016
http://www.mondoadr.it/articoli/verbale-di-mediazione-caso-di-rifiuto-proseguire-oltre-il-primo-incontro-vedo-sento-parlo-qualcosaltro.html

[6] Matteucci Giovanni, "*Civil mediation, how to kick-start it; the Italian experience.* ***Statistics 2011-2016*** ", 1.6.2017 https://www.academia.edu/32839525/Civil_mediation_how_to_kick-start_it_the_Italian_experience