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Mediation in Italy

Summary

I practice as a lawyer and an independent, *ad hoc* mediator. Part of my practice also comes from being a member of the panels of neutrals of the National and International Chambers of Arbitration of Milan and Venice, of the Chambers of Commerce of Verona and Florence and, finally, of the Mediation Centre (OVMF) created by the Bar Association of Verona.

The administered mediation I practice inside these providers has been deeply changed after the new Italian law on mediation, coming from the European Directive n. 2008/52/CE.

The new law not only reformed the administered mediation, but it also changed the Italian judicial proceedings related to the traditional Court system.

Before the legislative reform, the Italian situation concerning mediation was characterized by two main elements.

The first regards the many regulations on mediation, without any systematic nature. It was a "leopard-skin" texture of laws related to a broad and various range of scopes, with very few common definitions and notions, without a uniform regulation. None of the pre-existing rules described with details the procedure, while the definition of the mediator's role and the needed training descend from a recent law on business mediation. Besides, many differences emerged on the discipline of fundamental elements as the effectiveness of the settlement agreement.

The second element is more general. Before these days, a complex discussion on ADR methods was only developed inside an exclusive, not so large group of experienced professionals.

The Italian landscape was so characterized by a scarce awareness on mediation and by a mutually related lack of confidence by the legal class. The consequence is that the many laws on mediation were used rarely and not effectively.

The Italian judicial situation completes this description: a number of civil suits that is often too high for the general absorption capacity of the system, fatally doomed to a conclusion in a too high number of years.

This is the frame that the European Directive on mediation had to face: in these terms, it was a challenge for the Italian legislative and judicial structure. Somehow surprisingly, this structure reacted properly (one year sooner than the deadlines provided by the Directive), with a new Law on mediation that turned the challenge to judges and lawyers, first, and then to the community: Both found a new tool for the dispute resolution, very welcomed by many, not very comfortable for the others.

The new Law on mediation (the *decreto legislativo* n. 28/2010) contains a direct transposition of the European Directive n. 2008/52/CE. Besides, new peculiar rules were added. If some of them may improve the procedure's effectiveness, there's also a concrete risk if the mediation providers will not implement them correctly. In fact, the *decreto legislativo* draws general principles and ground rules, assigning the regulations of the mediation providers the task to fix more detailed rules: It will surely be a delicate and fundamental role.

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Beside the confirmation of the confidentiality of the procedure and of the impartiality and neutrality of the mediator, the new Italian Law on mediation generalizes the facilitative mediation's scheme, even if it allows – in certain cases, obliges – the mediator to suggest the content of the agreement. When the parties don't reach an agreement, the mediator can suggest a solution. The mediator shall suggest it in any case if both the parties ask for it.

A sharable, vast part of professionals and experts considers that a suggesting mediator is a mediator no more; But it doesn't avoid the possible consequences of this event. In case of an integral correspondence between the suggested content of the agreement and the eventual, following judge's decision, the party that didn't accept the mediator's proposal has to reimburse the other party's legal costs and to pay a fine. Fundamental will be the role of mediation providers, which can partially defuse the possible risks of this general provision through the elimination of the cases of optional suggestion by the mediator.

The *decreto legislativo* has another issue that was considered as critical. The "traditional" voluntary mediation is associated with many cases of compulsory mediation and the general provision of the mediation delegated by the judge. It is mostly the compulsory mediation that was criticized, even if it is a rule directly descending from the European Directive. Bitter controversies aroused between mediation "purists" and lawyers, that conceived it as a barrier to the access to justice.

Actually, it is to be highlighted that only the process' activation is compulsory, while reaching an agreement – and its eventual content – remains a decision of the parties. Moreover, with a justified reason, both parties can refuse to participate to the mediation, even if compulsory. A different consideration can be made: the number of cases where mediation is compulsory is broad, not homogeneous and apparently without any rationale. In this element – and also reading the official report that explains the *decreto legislativo* – is easy to find out the confirmation of the concern that the Italian reform on mediation was also motivated by the need to include into the judicial system a deflating tool for the number of proceedings. The compulsory mediation cases and the mediator's suggestion of the agreement – as well as the possibility, for the judge, to take the unjustified refusal to participate to the mediation as an element to consider during the decision - are conceived as out-and-out sanctions against negligent uses of mediation.

In this delicate and very controversial situation, the mediation providers come to play a fundamental role. The new Italian law accorded them a very broad freedom to establish their own regulation even concerning the cited critical issues.

The parties have a similar freedom in choosing their provider: no rule on territorial competence has been fixed by the *decreto legislativo*. The parties can decide which provider to invest considering geographical elements, as well as the skills and reputation of the panel of neutrals and the quality of the provider's regulation on the crucial elements of the law. While it helps the parties to avoid some negative consequences, this solution can grant a tailor-made mediation on their interests and needs. It could also incentivize a continuous improvement of the quality of the providers' services and of the reliability of the mediators' training.