CIVIL AND COMMERCIAL MEDIATION: AN EFFECTIVE AND EFFICIENT TOOL FOR THE DECONGESTION OF APPEALS IN CIVIL COURTS: THE EMPHASIS OF THE TAX ASPECT IN MEDIATION USED BY ITALIAN LEGISLATORS REPRESENTS A SAFE INCENTIVATION FOR ITS USE

MEDIEREA CIVILĂ ŞI COMERCIALĂ: UN INSTRUMENT EFICACE ŞI EFICIENT PENTRU DECONGESTIONAREA DE APEL DIN INSTANŢELE CIVILE: ACCENTUL PUS PE ASPECTUL FISCAL ÎN MEDIEREA UTILIZATĂ DE LEGISLATORII ITALIENI REPREZINTĂ UN INCENTIVATIONSIGUR PENTRU UTILIZAREA ITS

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Abstract : *With the european directive of 2008, by 2011, all members states must adapt their systems according to the european union rules on civil and trade mediation. In short, citizens must be allowed to use alternative means of civil justice. Italy has implemented the directive in question through the legislative decree 28 of 2010, giving the possibility to use a mediator to resolve disputes in civil and commercial matters, granting some form of incentivation such as the use of tax lever.*

Key words: *European directive, European Union, civil justice, civil and commercial mediation.*

1. INTRODUCTION

The term Alternative Dispute Resolution indicates all those methods or procedures or systems that allow you to licitly define a dispute of legal nature, without having to face the order of a judge as part of a Court Process.

In recent decades there has been decisive support for alternative methods of dispute resolution in Western countries, precisely ADR. This kind of action has found the driving force in the United States and has been considerably supported by EU institutions, that have introduced it in the context of consumer protection policies.

The most dated of these interventions was the promulgation of the Commission's Green Paper of 16 November 1993 "on consumer access to justice and the settlement of consumer disputes in the single market", which represented a first attempt to survey procedures, including extra-judicial forces in the Member States and the difficulties of applying these procedures to cross-border disputes.

Partly as a result of the aforementioned Green Paper and the consultation that followed, the Commission adopted two recommendations establishing the principles applicable to court procedures for resolving disputes regarding the consumer rights.

The first Recommendation (98/257/EC), adopted 30 March 1998, relates to the procedures that, regardless of what they are called, lead to a resolution of the dispute through the active intervention of a third party who assumes a formal determination. This first recommendation contains the seven minimum principles for the creation and operation of ADR: independence, transparency, contradictory, effectiveness, legality, liberty and representation.

The second Recommendation (2001/310/EC) of 4 April 2001, relates to the procedures that are limited to a mere attempt at rapprochement of positions of the parties to induce them to find a mutually acceptable solution. The principles identified in this recommendation are: impartiality, transparency, effectiveness and equity.

In the community process for encouraging extra-judicial procedures, on 19 April, 2002 "alternative methods of dispute resolution in civil and commercial matters" even outside the field of consumer affairs, was presented by the Commission Green Paper.

The institute of mediation, according to the dictates of Committee, aims at ensuring better access to justice, which allows admission to the methods of judicial and extrajudicial resolution of disputes.

Mediation can provide a convenient and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored for the needs of the parties. The agreements resulting from mediation are more likely to be complied voluntarily and easily preserve amicable and sustainable relationships between the parties. These benefits become even more noticeable in situations displaying cross-border elements.

2 - CIVIL AND COMMERCIAL MEDIATION IN THE EUROPEAN DIRECTIVE

The text approved by the European Parliament on April 23, 2008 which was the result of a compromise between the various instances of the member states (Directive No. 2008/52/EC of the European Parliament and the Council of May 21, 2008 concerning certain aspects of mediation in Civil and Commercial Matters, May 24, 2008 in OJEC, No. L 136/3), establishing the use of conciliation procedures for the resolution of cross border disputes in civil and commercial matters. To allow incorporation it is expected that Member States should carry out the Directive within their territory in the following 3 years. The Directive is, for all EU country systems, "the evolutionary line of the law" of civil and commercial mediation, this is because Member States are obliged, by 2011 (ex art. 12), to transpose the content. The importance of such a measure lies in the fact of it being the first(flow binding) European instrument that deals with mediation as a tool of general application for civil and commercial matters. The objective of the Community measure is specified in art. 1 of the Directive, where it is affirmed that, for the proper functioning of the internal market, the EU aims to ensure better access to justice, "to facilitate access to an alternative dispute resolution and promote amicable settlement encouraging the use of mediation by ensuring a balanced relationship between mediation and judicial proceedings". The European legislator considers the instrument of mediation as being able to provide a convenient and quick extrajudicial resolution of disputes through processes tailored to the needs of the parties, as it is believed that the agreements resulting from this process have a greater possibility of being voluntarily respected and have no problems in maintaining a friendly and sustainable relationship between the parties. The scope of the measure is defined in art. 1, paragraph 2, which stipulates that "the Directive applies to, cross border disputes in civil and commercial matters", and the consideration of n.10, which excludes that the Directive is applicable to the rights and obligations of the parties that do not have the right to decide for themselves under the relevant applicable law. Therefore, the legislature has intended to rule that the directive does not apply if the rights in dispute are unavailable. However, the reduced flow area with respect to cross-border disputes does not limit the promotional function of the directive. The Directive refers to "cross

border disputes" in civil and commercial matters, foresees that Member States apply the provisions contained therein also for national mediation process, except for those rights and obligations that parties may not have.

From Article 3 of the Directive, with reference to the subject matter covered, emerge the following characteristics of mediation:

• Firstly, the Directive overpasses the nominalistic distinction between conciliation and mediation, saying that, whatever the terminology, that the structured process where two or more parties dispute voluntarily trying to reach an agreement for the settlement of their dispute with the assistance of a mediator, is mediation;

• Any person, who has been called to conduct a mediation in "an effective, impartial and competent way", regardless of denomination or profession, can be called a mediator. So, even for the qualification of mediator, formal definition is preferred. In particular, the skills of the mediator are not connected to prior work and professionalism as he is asked to provide something new and special: the ability to conduct mediation effectively, the ability to lead the parties to conciliation with impartiality and competence;

• the Directive even when talking about voluntary conciliation, leaves Member States free to choose between mediation attempt mandatory or optional, however without doing the national legislation provided that such legislation does not prevent parties from exercising their right of access to the judicial system;

• the Directive is concerned with safeguarding confidentiality made in particular that neither the mediator nor anyone involved in the mediation can be forcibly invited to testify in subsequent proceedings, except for overriding considerations of public policy and for purposes of execution of the agreement reached through mediation;

• it can be considered a framework only for guidelines, leaving individual Member States the freedom to lay down further rules according to the peculiarities of the context.

The measure, licensed by the Euro Parliament, represents the first standard introduced in Community law relating to negotiated resolution of civil and commercial disputes.

The goal was to create, develop and strengthen an area of freedom, security and justice, in which the free movement of persons is guaranteed,

and is inserted into the initiatives to promote active cooperation in judicial civil matters essential for the proper functioning of the internal market.

Already at the meeting in Tampere on 15 and 16 October 1999, the Council of Europe had highlighted the core of the problem of ensuring a better and more effective access to justice, and had therefore called on Member States to establish extra-judicial procedures for the resolution of disputes. In May 2000 the Council returned to the topic, stressing the importance of an establishment of extrajudicial procedures for civil and commercial dispute resolution as a way of simplifying and improving access to justice.

Furthermore, in April 2002 the Commission presented a Green Paper dedicated to alternative dispute resolution in civil and commercial matters, tracking the status of the appeal using the procedures for negotiated settlement of disputes in civil and commercial matters within member countries, and launching a widespread consultation with the States, and all other interested parties, to achieve an alignment of the applicable procedures and the identification of effective strategies for a concrete diffusion of the access to Alternative Dispute Resolution.

The European legislator has decided to identify the first principles of reference for community conciliation in the field of European cross border disputes, considered to be appropriate for the benefits of mediation, with the hope that a positive outcome of the application may induce states to enhance the application of pre-established rules for the internal procedures out of courts

European cross-border dispute is intended as a dispute in which at least one of the parties is habitually resident in a member state different from that of the other party when:

a) the parties agree to use mediation after the dispute has arisen;

b) mediation is ordered by a magistrate;

c) the obligation to use mediation is established by a rule of national law;

d) the parties attempt mediation or attend an information session.

3 - MEDIATION IN THE ITALIAN ORDER

The "mediaconciliazione" is not new in the Italian order, because with the evolution of the civil legal system, mediation1 or conciliation2 has always played a crucial role in safeguarding a peaceful resolution of disputes. In 1961, a famous jurist lawyer from Modena wrote, "the conciliator represents the detailed body of jurisdiction for civil litigation, in cases of moderate value. This function is united to another: a public body to which, by tradition, is entrusted the performance, at request, for the friendly settlement of civil disputes at any level. It must also be noted that, a phenomenon manifesting itself in increasing proportions not only since the last Code of Civil Procedure, whose core activity of the offices of conciliation is centralized in the exercise of civil jurisdiction, within the limits of powers that the legislature has gradually increased, in adjustment with inflation and growth of the number of disputes.

Instead the function of conciliation has been hit by the crisis and today is almost lacking in exercise, often entrusted with more success, when needed, to other administrative and judicial proceedings, such as, the

[1] The Civil Code rules on mediation, even if included among those on individual contracts, the agreement does not refer to mediation, nor provide a notion of the report, but describe the figure of the mediator, which according to article. 1754 cc, is the one that correlates two or more parties to conclude a deal, without having any ties of collaboration or representation with them (Legal Encyclopedia, entry: *mediation*, Il Sole 24 Ore, 2007)

[2] This idea of this institution was drawn from the Neapolitan legislation, which theoretically deserved some praise. The figure of medioconciliatore, in fact, must endeavor to settle any kind of dispute between people who resort to the exercise of his family ministry. But it is not necessary that the interposition is demanded of him, since he would not be able to respond to the decorum of justice and the authority of the judge for a voluntary intrusion, officious as in private matters, except in cases of initiated litigation, in which case the reconciling interposition of the magistrate called to pass judgment is appropriate. Reconciliation is not always necessary for a transaction, it can also be accomplished by fully recognizing the rights of others or fully renounce one's own. In any case, always a convention is always constituted, and more often a transaction; in order to simplify and generally caution to limit the field of conciliation to the objects on which it is allowed to operate (Ludovico Mortara, Manual of Civil Procedure, Turin, 1901) .

provincial employment and unemployment offices and the magistrate judge of the civil proceedings. "3

Lately, in many jurisdictions, there have been attempts to boost the institution of conciliation. The conciliation process is characterized by the intervention of a third party, whose job is to facilitate the parties' agreement. The function of the third party in conciliation process is not to be confused with that of the arbitrator: this figure has the power oblige the parties to resolve the dispute, because the ruling is binding upon the parties as is a sentence. The mediator, however, does not impose, but proposes. The intervention of the mediator encourages agreement between parties, but such agreement is in any case the exclusive result of their will, and only they themselves are responsible, speaking in legal terms, it is no different from what the parties could conclude on their own, without the intervention the conciliator. The legal system and the effects of the final reconciliation cannot be distinguished, as a matter of principle, from the legal system or the effects of a contract, signed by the parties without the intervention of the mediator.

On the one hand there is the so-called adjudicative conciliation., or rights-based approach, in which the mediator assesses the cases, and submits their proposal which coincides with what would have been, in his view, the decision of the dispute in court (or arbitration). The parties may accept this proposal, balancing the risks and benefits (also in terms of timing) of the consensual non autonomous solution.

The other is the so-called facilitative conciliation or based on interest, in which the mediator does not assess cases, but tries to discover their underlying interests, and offers them a proposal which best meets that interest.

In the Italian legal system, there has been a continuous proliferation of conciliatory institutions. Among the best known methods there are: the mandatory settlement, as a condition of admissibility of the request, put forward to the Provincial Inspectorate for Agriculture (3 May 1982, n. 203, Art. 46), the obligatory analytical attempt to introduce disputes concerning labor, social security and compulsory care (Articles 410, 410a, 411, 412, 412a, of the Civil Code), now optional, the mandatory settlement for the

[3] F. Lancellotti, entry: *Conciliatore*, in Enc. Dir., Milan, 1961,VIII 391.

regulations of subcontracting in productive activities (Act June 18, 1998, n. 192, Art. 10), the mandatory settlement expected in telecommunications (Legislative Decree 1 August 2003, n. 259, Art. 84), preparation for court settlement for the resolution of consumer disputes (Legislative Decree 6 September 2005, n. 206, Art. 141), the procedures provided for saving and investment (Decree 8 October 2007, n. 179, Art. 4), the procedure for resolution of disputes relating to transactions in banking and financial services (Legislative Decree 1 September 1993, n. 385, art. 128a). To these it is added that article 321 of the Civil Code. - now replaced by Art.45 of l. November 26, 1990, n. 353 – foresaw reconciliation in a non-contentious venue, before the conciliator, figure replaced - by art. 30 l. November 21, 1991, n. 374 - Justice of Peace.

Reconciliation, according to Soldati, is one of the alternative forms of conflict resolution, through which the conciliator, neutral third party, has no power over the assisted, so they can find harmony within the conflict, facilitating communication, through the identification of the different points of controversy, highlighting the interests and needs and directing the parties towards satisfactory reasoning.

Subsequently, the normative enthusiasm towards conciliation and mediation, seems far from finished despite the introduction of Decree 28 of 2010 which saw the world of professions and businesses sometimes lined up on opposite sides, not so much, regarding the tool, but rather in relation to its modality of use.

The new discipline within the civil and commercial disputes field must be read as a sublimation of the coexistence of ordinary justice and dispute resolution negotiation, coexistence, consistent with the provisions of the Constitution, considers access to justice not only as access to jurisdiction, but also access to alternative procedures to the definition of jurisdictional conflicts.4

With the decree No. 28 of March 4, 2010 pursuant to delegated legislation5 act No. 69 of June 18, 2009, the legislature acknowledging an

[4] N. Soldati, *La nuova mediazione e conciliazione nelle materie di applicazione,* Milan, 2022, p. XIV.

[5] G. Karaites, the delegation in matters of mediation and conciliation in civil and commercial disputes art. 60 Law No. 69 of 2009, in Arbitration. Studies offered by

EU directive6 wanted to regulate a process of mediation aimed at resolving civil and commercial disputes between extra-judicially parties operates through a specific activity that is called mediation.7

The most important novelty of the provision of the law consists of the provision contained in Article. 5, which puts mediation as a condition of admissibility for appeal before a natural judge in matters of rights, division, inheritance, family agreements, lease, loan, business leasing, damages resulting from medical liability and media defamation or other means of advertising, insurance, banking and financial contracts.8

Giovanni Verdi, Naples, 2010, p. 657; R. Caponi, Delegation regarding matters of reconciliation of disputes in court it., 2009, V, p. 354; C. Punzi, reforms of civil procedure and alternative tools for dispute resolution, in Riv. dir. proc., 2009, 1231.

[6] Directive No. 2008/52/EC of the European Parliament and Council of 21 May 2008, concerning certain aspects of mediation in civil and commercial matters, in the O.J May 24, 2008, No. L 136/3. For greater examination: E. Zucconi Galli Fonseca, *The new mediation in the European perspective: notes on first reading*, in Riv. Trim. dir. proc. Civ., 2010, p. 653; M. F. Ghirga, *Alternative tools of dispute resolution: escape from the process or the right? (reflections on mediation in connection with the publication of Directive 2008/52/EC)*, in Riv. dir. proc., 2009, p. 357; E. Minervini, *The European Directive on conciliation in civil and commercial matters*, in Contr. and Impr. European Union, p. 41, V. Vigoriti*, EU directive the draft on mediation*, Rass. For., 2005, p. 359.

[7] For greater discussion of matter AA.VV. *Medioconciliatore Manual*, Academy School, 2011; F. A. Genovese, *The mediation of civil litigation as a means of deflation*, Cor. Trib, 10/2011; N. Soldati, *The new mediation and conciliation in enforcement*, Gruppo24Ore, 2011; F. Delfini, *mediation for civil and commercial dispute resolution and the role of Advocacy*, in Riv. Dir prov., 2010, I, p. 25; R. Tiscini*, Advantages and disadvantages of the new mediation aimed at conciliation: agreement and judgment in compared*, Giust. Civ., 2010, p. 489; R. Caponi, *Civil justice to the test of mediation. General framework*, the Forum it., 2010, V, p. 89; G. P. Califano, *Mediation procedure for conciliation of civil and commercial disputes*, Padua, 2011; M. Bove, (ed.), *The mediation for the settlement of civil and commercial disputes*, Padova, 2011.

[8] With the Decree Law of 29 December 2010, known as Decree No. 225 Milleproroghe, disputes concerning condominium and compensation for damage caused by the movement of vehicles and boats, mediation is imposed as a condition of admissibility as of March 21, 2012

This shows that, mandatory mediation on disputes relating to credit rights arising from contract cases not included among those foreseen in paragraph 1 of Article. 5 (such as buying and selling) are not subject matter, just as not all disputes based on contractual liability are covered by the rule that refers to cases of damages caused by car and vessel accidents, and medical liability and compensation arising from criminal libel from media or other means of advertising.

The admissibility must be pleaded by the defendant. Under penalty of forfeiture, or detected by the courts, no later than the first hearing. In the case where the court finds that mediation has already started and not yet ended, it fixes the next hearing after the foreseen expiry date of the mediation process that is after four months. However, if mediation has not been conducted, the judge gives the parties the period of fifteen days to submit the request for mediation (Article 5, paragraph 1).

Mediation is also mandatory in the case provided by art. 5, paragraph 5, concerning the inclusion of a mediation or conciliation clause in a contract or in the statute or in the articles of an institution. In this case, you may not refer to the jurisdiction of the judge (and in this case not even to a possible arbiter)9 if mediation and / or conciliation10 does not occur first. The application is made before the body specified in the clause or if there is

[9]The inclusion of the arbitration system in the ADR (Alternative Disputes resolution) is not agreed by all. In fact, according to some, it cannot be effectively regarded as an alternative tool in our system because its rules are contained in the Code of Civil Procedure. For this reason also the arbitration would became part of the ordinary way of resolving a conflict. On the one hand, it is believed that the reference contained in the acronym ADR is to be understood with reference to the ordinary way and teacher for the resolution of disputes: the ordinary judge. In any event, it is believed that this disquisition is relevant for the purposes of concern to us (A. Bandini, The *opportunities of mediation*, in Techniques *and tools for the mediation process*, various authors, 24 Ore Group, 2011, p. 4 note 4).

[10] It is well to clarify that the terms "mediation" and "reconciliation" can be used interchangeably, even if the delegated legislator with the Legislative Decree 28 of 2010 wanted to differentiate the meaning, intending Mediation as "activity, however nominated, conducted by a impartial third party, and aimed to assist two or more subjects in seeking an amicable agreement for the settlement of a dispute, both in the formulation of a proposal for resolving the same ", while for conciliation," the settlement of a dispute following the mediation process "(Article 1 lett. a) and c)).

no other body in front of another organism duly registered at the Ministry of Justice, in compliance with article. 4, paragraph 1. If despite the clause the attempt is not exhausted, the court or arbitrator, except for part of the proposal at the first hearing, allows the parties a period of fifteen days for the submission of the request for mediation and in this case also fixes the next hearing after the expiry of the deadline for the duration of the mediation process. Similarly, the court or arbitrator fixes the next hearing when mediation has started but not completed.

Mediation can also be delegated or operating iudicic as mandatory mediation in the circumstances envisaged by art. 5, paragraph 2, where the invitation to mediation may take office in the possibility that the parties do not adhere to it. The rule allows the judge, even if on appeal, to value the nature of the case, the level of education and the conduct of the parties, to invite them to proceed to mediation (even if mediation has already occurred). The invitation should be addressed to the parties before the final hearing or if such hearing is not scheduled, before the discussion of the case. If the parties accept the invitation of the judge, he fixes the next hearing after the expiry of the deadline for the duration of the mediation process and, if mediation has not been started, the judge assigns the same parties the term of fifteen days for mediation.

As we have seen, in the mediation process, the figure of "mediator”11 assumes a predominant role. Article. 8, paragraph 3 of the Decree states that the mediator shall endeavor "to ensure that the parties reach an amicable agreement in the settlement of the dispute." If the agreement is not reached or if the parties so request, the mediator may make a proposal for a settlement agreement, and also in this case it is the parties to decide whether to accept the proposal or not (which marks the distinctive intervention of an arbitrator stated under art. 1349 cc). One limit to the

[11] The Ministerial Decree 180 of 2010, as amended and supplemented by Ministerial Decree 145 of 2011, establishing the figure of mediator: a third neutral and impartial to the parties and to the dispute, without power of decision, but with the task of facilitating the achievement of a agreement between the litigants. To become a mediator you must possess at least a bachelor's degree in any address or enrolled in any order or college and have attended a course lasting at least 50 hours at any training organization accredited by the Ministry of Justice.

proposal is to ban a mediator (unless otherwise agreed by the parties) and to refer to statements made or information acquired during the procedure (Article 11, paragraph 2 d. Lgs. 28/2010). If this ban is strictly considered, in many cases, the proposal would not be adequately justified and would be reduced to something like the device of a judgment. It is therefore necessary to interpret this rule strictly and in light of what is stated in art. 10, paragraph 1 d. lgs. 28/2010, which expressly refers to the statements made by the parties and the information from the parties, however, other evidence obtained by the mediator in the course of his investigation (documents, technical assessments, etc..) can be called upon for the eventual proposal to the parties. Furthermore, Article. 11 paragraph 3 d. lgs. 28/2010 states that the agreement reached by the parties, possibly as a result of the proposal made by the mediator "may foresee the payment of a sum of money for each violation or failure to comply to the rules namely delay in their implementation." It is not an eventual imposition of the mediator, but a penalty to which the contextual parties undertake under their agreement, albeit at the proposal of the mediator. The mediator, therefore, lacks any power regarding the compelling decision on the dispute (except, of course, if the parties decide unanimously, at any time of the procedure to attribute to him/her the role of arbitrator).12 The desired agreement of the parties that

[12] In the EU the tools for alternative dispute resolution such as mediation and arbitration, have already undertaken a major role in legislature for many years. Lately regulations and disciplines in which the mediation and arbitration are crucial have been assisted and, in some respects, strategic management of the litigation (G. Deodato, *Conciliation and Arbitration, among European indication and national initiatives, in Justice*, 2008, 2, 179 S. Sticchi Damiani, *alternative systems of jurisdiction*, (ADR*) in European Union Law*, Milano, 2004). With regard to financial markets, it is necessary to draw attention to the Directive 2004/39/EC of 21 April 2004, cd. MiFID (*Market in Financial Instruments Directive*), which, in keeping with the philosophy of the Community legislature, in art. 53 that "Member States should encourage efficient and effective procedures of complaints and appeals for extrajudicial resolution of consumer disputes relating to the provision of investment services and make use of accessories from investment firms, using, where appropriate, existing bodies. Member States shall ensure that there are no statutory or regulatory provisions from cooperating effectively in cross-border disputes. " For existing organizations in Italy it is referred to those established by the Chamber of Commerce and with Consob. Today also recognized organizations under the Ministerial Decree 180 of 2010, are entitled to settle any dispute referred

the mediator tries to obtain, possibly suggesting an agreement, is just a common contract transaction, even innovative if the parties have agreed so. In the process of mediation, the mediator proceeds without formalities at the venue for conciliation, with the intention of ensuring that the parties reach an amicable agreement in determining the case, in respect of public order and of mandatory rules.

- TAX BENEFITS PROVIDED BY ITALIAN LEGISLATION

Legislative Decree 28/10 closes with the provision of tax breaks aimed at encouraging the use of the mediation process. This is an aspect of the process that echoes the general principle, strongly desired by the legislature, to make "the path of Mediation" an informal path, characterized by a simple, economical and quick procedure.

In accordance with the general guidelines issued by the enabling act, in fact, art. 17 and Art. 20 govern the tax aspects of mediation.13 The legislator has used such tool for tax reductions, exemptions and tax credit. The reasons at the basis of the tax law are those that inspire the entire decree, or favor conciliatory mechanisms, promoting their use so as to

in the MiFID Directive (for a wide discussion: N. Soldati, *mediation in corporate, banking and finance disputes* in *The new mediation and reconciliation in areas of applicatio*n, various authors, Milano, 2011, p. 44 et seq.).

[13] The above mentioned law is identical to that contained in the repealed art. 39 of Legislative Decree No. 5 of 2003. Within the company settlement foreseen, in fact, in art. 39 of the decree in question, exemption was limited to twenty-five thousand euros. This limitation created discrepancy of standards in our law, that the legislature had discrepancy, however, already well known, so much so that, as stated in the report accompanying this provision, such law had been dictated with the primary purpose of preventing an elusive use of conciliation to prevent, through the activation of simulated disputes, reaching and achieving, during conciliation, a structure of interests equal to that which could have obtained through acts, that is to say, contracts subject to proportional registration tax. In any case, even without resorting to a simulated dispute, the parties would, however, have had an interest in resolving a dispute through conciliation, rather than through a transaction that, if it had foreseen the part of the payment of a sum of money this would have been subject to a tax of three percent (N Soldati, *op. cit.*, p. note 93 192).

deflate the civil litigation. For this purpose it has been stated in Article. 414 that the lawyer must inform his client of the opportunity of tax benefits for the process of mediation process.

In the second paragraph of Article. 17 it is stated that all records, documents and measures related to the mediation process are exempt from stamp duty15 and all expenses, taxes or charges of any kind or nature. Others not subject to taxation are: the request for mediation, the adhesion to mediation, any settlement proposal made by the mediator, the conciliation report, the appointment of the conferment of office by the mediator. So, we can assert that any other prodromal act, during or after mediation is not subject to any tax.

The documents produced during the mediation process, without stamp duty are valid, as the hearing body has no obligation to send these documents to the Inland Revenue office for their regularization.16

The third paragraph of art. 17 states that the verbal agreement is not subject to registration17 within the limit value of fifty thousand euro, tax is due on the portion exceeding that amount, calculated on the basis of the value indicated in the agreement report and not the request for mediation or requests made by the parties. A first reading of the provision it seems

[14] Article 4, paragraph 3 states: "At the conferment of the task, the lawyer must inform the client of the possibility of using the mediation process governed by this decree and the facilities provided for in Articles 17 and 20 . The lawyer shall also inform the client of the cases in which the exercise of the mediation process is a condition of admissibility for the proceedings ... "

[15] Stamp duty is regulated by the Presidential Decree October 26, 1972 No. 642.

[16] Incentive under the content estimates had already been introduced in other projects and bills (Bonito Bill No. 541 of June 6, 2001 "Regulations concerning conciliation and arbitration"; Fragala Bill No. 2538 of March 19, 2002 "provisions for the establishment and operation of the dispute Resolution Chamber "; Mazzoni Bill No. 2877 of June 19, 2002" Regulation on the negotiation and consensual resolution of civil disputes "; Finocchiaro Bill No. 3559 of June 21, 2003" provisions for the establishment of chambers of reconciliation and the promotion of consensual resolution of disputes "; Cola Bill No. 2463 of March 5, 2002" standards for professional-court conciliation. "

[17]The registration fee is regulated by Presidential Decree April 26, 1986 No. 131.

problematic to quantify the value of the verbal agreement, which is different from the value indicated to initiate mediation. In fact, it may be difficult, if not impossible, to quantify the value of mediation through its agreement, if this does not indicate the value or contains any quantification of money to be paid. So, it is advisable to always indicate a value inside the agreement in order to avoid an indiscriminate taxation of the same, in cases where its value is less than fifty thousand euros.18

With regards to the agreement with a value exceeding fifty thousand euros, the excess part is taxed according to ordinary criteria: a fixed fee is applied in the event that benefits deriving from the conciliation report are subject to VAT pursuant to art. 40 DPR 131/86, at a proportional rate to vary the content of the agreement, if otherwise.

The application for registration falls on the parties or the interested party, subject to the constraint upon the parties paying the tax.19

The last two paragraphs of Article. 17 concerning the funding of exemptions foreseen in paragraphs 2 and 3.20

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[18] Mediation is able to end a dispute between parties through an infinite number of compositional options that, very rarely have a direct feedback at onset between requested and delivered, a principle that inposes judges and arbitrators to strictly apply the rules of law, subject to the assumptions of judgment in equity, leading, or rather should lead to a limited number of possible solutions

[19] Since the record is made enforceable by a decree of the President of the Court, in whose district the organism resides, after verification of its proper form, the same as is the case for the approval of the arbitral decision, it could also be assumed that the application for registration should be done by the Registrar within 5 days from publication in accordance with art. 13, third paragraph, of the Presidential Decree 131/86.
However, in the silence of the law, namely a provision similar to that provided for the approval of the arbitral decision, all that remains is to confirm the orientation whereby the burden of requiring registration is incumbent on the parties jointly within 20 days of approval (N. Soldati, *op. cit*., p. 94 <9

[20] For the purpose of funding the revenue under this Article, the Ministry of Justice shall annually pay the amount equal to the amount of resources destined to tax credits on special accounting n. 1778 "Tax offices - Budgetary funds." The first paragraph of art. 17 of Legislative Decree 28 states expressly that: "In

Another fiscal tool on which the legislator has focused to encourage mediation is the tax credit under Article. 20 of the Decree in question: "The parties who are subject to the allowance authorized to conduct the mediation process is recognized by the organism, if mediation is successful, a tax credit allowance proportionate to the same allowance up to the competitive five hundred euros, determining as stated in subsections 2 and 3. In case of failure of mediation, the tax credit is reduced by half. "

Despite the legislature's intent to encourage mediation by means of taxation, however, some problems may arise from the success of the tax credit tool, because the party is not in a position to know in advance the actual amount of credit owed, but at a later time, in light of the resources allocated and the amount of tax credits recorded in the previous year. In fact, from the year 2011, by decree of the Minister of Justice,21 by April 30 of each year, the amount of resources that rely on the share of 'single Justice Fund' in Article 2, paragraph 7 , letter b) of Decree-Law 16 September 2008, n. 143, is determined, ratified with amendments by Law 13 November 2008, n. 181, intended to cover revenue losses resulting from the granting of the tax credit referred to in paragraph 1 regarding mediation concluded in the previous year. By the same decree is identified the tax credit payable in relation to the amount of each mediation in proportion to the resources allocated and, anyway, to the amount indicated in paragraph 1. Then, the Ministry of Justice will inform him of the amount of tax credit

implementing art. 60, paragraph 3, point 0) of Act 18 June, 2009, No. 69, tax relief provided by this Article, paragraphs 2 and 3, of Article 20, are among the aims of the Ministry of Justice to fund with part of the resources given to <Fondo Unico Giusitizia> attributed to this ministry, under paragraph 7 of article. 2, letter b) of Decree-Law 16 September 2008, No. 143, ratified with amendments from Law 13 November 2008, No. 181, and paragraphs 3 and 4 of Article 7 of the Decree of the Ministry of Economy and Finance July 30, 2009, No. 127. "

[21] Article. 17 of Legislative Decree 28 of 2010 requires the conciliation bodies to provide information about the success of mediation cases and cases of exemption from payment of compensation with reference to different types of mediation (mandatory, voluntary or delegated by the judge) in compliance with the provision of art. 11 of Ministerial Decree 180/2010, i.e. for the monitoring accruing to the Ministry of Justice.

payable within 30 days after the deadline specified in subsection 2 for its determination and transmit, via internet, the list of the Inland Revenue beneficiaries and the relative amounts for each.
The tax credit must be given, under penalty of forfeiture, in the tax return and can be used from the date of receipt of the notification referred to in paragraph 3, in compensation under Article 17 of Legislative Decree July 9, 1997, No. 241, as well as, by individuals who have no business income or self-employment, in reduction of income tax. The tax credit does not result in reimbursement and does not contribute to income for taxation or the net value of production for the purposes of regional tax on productive activities and is not relevant for the purposes of the report referred to in Articles 61 and 109, paragraph 5, of the income tax law, stated in the Decree of the President of the Republic on 22 December 1986. No. 917.

CONCLUSIONS

The European Parliament urged Member States to encourage the use of, for the management of conciliation procedures, modern technologies of communication, inviting the consideration of the additional benefits that A.D.R. are able to ensure, particularly in cross-border litigation, which would eliminate the obstacle of distance among the parties and obviously also that of the handling body.

The Directive provides that access to cross border conciliation should be characterized, above all, by its voluntary nature, the guaranteeing the parties free unconditional exercise of any withdrawal.

To ensure the necessary mutual trust between the parties and the confidentiality of the proceedings, as well as the implementation of agreements reached in mediation, Member States are requested to encourage, by any means they consider appropriate, the training of mediators and the introduction of effective mechanisms for monitoring the quality of mediation services.

The Member States must ensure the flexibility of the mediation process and the autonomy of the parties, supervising its impartial and competent effectiveness, , while the mediators themselves are required to strictly follow the provisions laid down by the European Code of Conduct for mediators

Regulation no. 861/2007 of the European Parliament and the Council has introduced, civil proceedings simplified for the definition of cross-border disputes on issues of modest economic entity, in legislation.

The pretentions of "small claims procedure" are identified as those whose value is at most equal to € 2,000.00 excluding interest, fees and expenses, with the exception of matters relating to rights not available, marital relations and inheritance, alimony issues and bankruptcy, employment and privacy issues.

Already, at the meeting in Tampere on 15 and 16 October 1999 the European Council had called on the Council and the European Commission to establish a system of common procedural rules that simplify and accelerate incisively the management of cross-border disputes, in Consumer and commercial matters.

In December 2002 the Commission therefore adopted a Green Paper on the European enforcement order, and had therefore launched a consultation on possible ways to get the acceleration of the management of the prosecution of small claims matters.

The discussion is mostly written, but is done save possible fixing date of hearings at the request of parties or office or if deemed necessary, including by videoconference or other technological means of communication available.

Without detracting attention to cost containment and control of proceedings by the parties themselves.

The Regulation affirms that the assistance of a lawyer is not mandatory for the parties, but it is strictly the responsibility of the courts to do their best to reach a conciliation of the dispute

The EU directive has already been adopted by almost all Member States have undoubtedly facilitated the EU countries to introduce the institute of mediation in their national courts in order to deflate the courts of quarrels that can surely be overcome, thanks to mediation. This then allows states not only to ensure a speedy and economic resolution of disputes, but also to decongest the courts from unnecessary controversies in the hearing rooms where a vigorous "pugnandi animus" of the parties is well recognized.

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