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Alternative dispute resolution in the Italian insurance system

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Abstract

This paper intends to provide a comprehensive overview of the current Alternative Dispute Resolution (ADR) methods available in the European regulatory framework, with particular focus on the Italian legal system, with the intend to reduce the high degree of congestion in the courts of the Member States, while at the same time offering efficient out-of-court redress mechanisms complementary to the ordinary court system. In addition the effects, advantages and critical issues of the ADR methods available in the insurance sector will be analyzed, with particular regard to the motor insurance.

Keywords: alternative dispute resolution arbitration, mediation negotiation insurance system

1. INTRODUCTION

It is generally accepted that the notion of Alternative Dispute Resolution (ADR) covers a set of methods that allow parties to a dispute to reach an amicable solution with a view to avoid or suspend judicial procedures. The European Commission has given its own definition of the same conception the Green Paper of 19 April 2002, as being out-of-court dispute resolution processes conducted by a neutral third party, excluding arbitration.[1] The Green Paper in general represents ADR as alternative methods of settling or resolving disputes that, for certain matters, can be more efficient than instituting judicial or quasi-judicial (arbitration) proceedings, because it help the parties to enter into direct dialogue and to come to their own assessment of the value of going to court.[2]Another underlying ground to support ADR is that the efficiency and functioning of justice is undoubtedly a necessary condition to enhance economical growth and stability within the Member States. In this context, many domestic regulations related to ADR, have clearly considered the recommendations and the communications of the European Commission for the Efficiency of Justice.[3]In addition to these recommendations, the European Union has adopted different regulatory rules to favour the introduction of ADR mechanisms within the Member States among which the Directive 2008/52/EC on „certain aspects of mediation in civil and commercial matters", the Directive 2013/11/EU on „alternative dispute resolution for consumer disputes" (ADR Directive) and the related Regulation No 524/2013 on „online Dispute Resolution for consumer disputes."[4]

The ADR Directive applies to disputes between consumers and traders concerning contractual

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[1] As highlighted in the Green Paper on alternative dispute resolution in civil and commercial law, presented by the Commission the 19th April 2002, „Arbitration is closer to a quasi-judicial procedure than to an ADR, as arbitrators' awards replace judicial decisions."

[2] This is different from the concept in the United States where ADR is represented as a dispute resolution mechanism with the main aim of reducing litigation explosion and managing the failure of the Federal and State courts to conclude the judicial proceedings in a timely manner (De Palo, 2008, 195–197), who in particular highlights that the North American model implies an active involvement of the court system in finding alternative solutions to the disputes, since the courts become a „multidoor court-house", whereas in Europe ADR is more regarded as alternative procedures to the ordinary judicial system, with the intention of providing the European citizen fast, economic, efficient and effective protection, in particular where the judicial protection appears insufficient (Sticchi Damiani, 2004, 27). For a historical and comparative study of the alternative legal protection in Europe and United States see Santagada, 2008, 15–126.

[3] Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes; Commission Recommendation 2001/310 /EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes; Communication from the Commission of 19 April 2002, Green Paper on alternative dispute resolution in civil and commercial law.

[4] For an overview of the current use and potential of On line Dispute Resolution in the B2C context see Cortés, 2011, 51–223.

obligations deriving from sales or services contracts, both online and offline, in all economic sectors.[5] In order to achieve a high level of consumer protection, the Directive's objective is to ensure that consumers can, on a voluntary basis, „submit complaints against traders to entities offering independent, impartial, transparent, effective, fast and fair alternative dispute resolution procedure" (art. 1).[6] With such a purpose, the Directive foresees a broad spectrum of available ADR techniques: facilitative, evaluative and binding processes (Bottino, 2014, 403).[7]

The recourse to ADR is moreover a valuable tool for the insurance sector where the contractual relationship depends highly on the confidence in the integrity of the information provided to the insurer, which generally increases the risk of speculative behavior by the insured party and therefore the number of disputes. Since this cost of litigation ultimately impacts on insurance premiums, the European legislator has promoted specific ADR methods for the insurance sector by adopting the Directive 2002/92/EC on insurance mediation that explicitly encourages Member States to set-up appropriate and effective complaints, and redress procedures for out-of-court settlement of disputes between insurance intermediaries and customers.

The same rationale has been adopted in the recent proposal for the reform of directive on insurance distribution (IDD)[8] and will replace the 2002 Insurance Mediation Directive.[9]

In order to complete the framework of the legislative tools that have been implemented at European level, to improve the relationship between the insurance companies and their customers,it is important to also note the guidelines[10] on „Complaints-Handling by Insurance Undertakings" adopted by EIOPA (European Insurance and Occupational Pensions Authority)[11] which will become effective on January 1st 2016, together with the Directive 2009/138/ EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II Directive),which obliges Member States toprovide supervisory authorities with the necessary means to protect policy holders and beneficiaries. The Solvency II directive has also introduced general corporate governance requirements, which provide for sound and prudent management of the insurance business.

In the light of the above European regulatory framework, this paper will providean overview of the most important ADR methods available in the Italian legal system. Although, the Italian ADR regulatory rules also aim at reducing the high degree of congestion in the courts**,** while also offering efficient out-of-court redress mechanisms complementary to the ordinary judicial system, the ADR mechanisms in Italy have some distinguishing traits compared to those available in other European Member States. This paper intends to highlight the limitations as well as the advantages of those distinguishing traits in the overall management of civil and commercial litigation, with particular attention to the effects of these methods on the insurance sector, with particular reference to the motor insurance.

[5] The Directive has been adopted on the ground that „ADR has not been correctly established and is not running satisfactorily in all geographical areas in the Union. Consumers and traders are still not aware of the existing out-of-court redress mechanism (…) and where ADR procedures are available their quality levels vary considerably in the Members States and cross-border disputes are often not handled effectively by ADR entities" (recitals 5 Directive 2013/11/UE)

[6] The Directive provides for a *de minimis* harmonization by which the Member States have broad discretional rights to maintain or increase the protection of consumers in respect of the Directive. The latter does not provide for any compulsory ADR but this goes „without prejudice to national legislation making participation in such procedures mandatory, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system" (art. 1).

[7] The Italian Government has implemented the ADR Directive through Legislative Decree n° 6/2015, which in particular amended article 141 of the Italian Consumer Code. The Italian Legislator has opted merely for the facilitative and evaluative procedures without considering the binding procedure provided for in the above ADR Directive.

[8] In the amendments adopted by the European Parliament on 26 February 2014 on the proposal for a Directive of the European Parliament and of the Council on the insurance mediation, the following has been specified (recitals n° 28) „there is a need for appropriate and effective out-of-court complaint and redress procedures in the Member States in order to settle disputes between insurance *distributors* and customers, using, where appropriate, existing procedures. *These* procedures should be available to deal with disputes concerning rights and obligations under this Directive. Such out-of-court complaint and redress procedures would aim to achieve a quicker and less expensive settlement of disputes between insurance *distributors and customers*."

[9] The final compromise text of the IDD was published on 16 July 2015 and will now be submitted to the European Parliament and to the European Council for final adoption.

[10] Published on EIOPA's website, 31 October, 2013.

[11] Incorporated through Regulation (EU) No 1094/2010 of the European Parliament, and of the Council of 24 November 2010.

2. ADR MECHANISMS AVAILABLE IN ITALY

Besides the conciliation methods already available in some specific sectors, the main three ADR mechanisms introduced recently in the Italian legal systemare the following:

1) Mediation with the aim of entering into a conciliation agreement in civil and commercial matters(regulated by the Legislative Decree No. 28/2010 which has implemented the above mentioned Directive of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters);

2) Assisted negotiation procedure with the support of one or more lawyers(introduced by Law Decree No. 132/2014);

3) Prosecution of the legal proceedings in arbitration: possibility to continue pending civil proceedings before an arbitration court (introduced by Law Decree No. 132/2014).

3. MEDIATION WITH THE AIM OF ENTERING INTO A CONCILIATION AGREEMENT IN CIVIL AND COMMERCIAL MATTERS

3.1. Premise

Mediation is an out-of-court redress mechanism managed by a neutral party who has the task of facilitating discussions between litigating parties and guiding them in the process of reaching a mutually acceptable solution for the dispute. The purpose of the mediator is not to resolve the dispute by compelling the parties to accept a solution or a decision, as for example in arbitration, but to facilitate the parties' attempts, by offering her/his abilities and expertise, to find an agreement (facilitative mediation) or to propose a possible acceptable solution for the dispute (evaluative mediation) (Riskin,1997, 17; Alfini, 1997, 919). In consideration of the non adjudicative nature of the mediation, in the event of a conciliation agreement being reached, this shall not be considered a three party decisionbut an agreement between the parties which shall only be binding on the parties after they have duly acknowledged, evaluated and accepted its terms. The parties can,as a result,only challenge the outcome of the mediation on the basis of the ordinary appeal methods available for a contract without being able to invoke procedural defaults such as lack of impartiality of the mediator.

Reducing the goal of mediation to merely fighting the judicial inefficiency appears too limiting since this institution, in order to be successful, requires cooperation between the parties which, as game theory indicates, is able to generate a positive result for both parties (and for the whole system).[12] This mechanism will not determine a winning and a losing party but rather two winning parties, although to an extent different from the one expected (Verdone, 2011, 1028).Furthermore, mediation is able to substantially influence the management of the conflict (Maniori, 2011a, 994), which then allows for innovative dispute resolutions inconceivable under the ordinary judicial or arbitration procedure, which are strictly linked to the claim and counterclaim. Hence, rather than an alternative judicial method, this can be considered an „alternative to justice."[13] Under this perspective, mediation, as any other ADR method, should have priority in respect to a court procedure: the judicial procedure which remains available and a constitutional right, should be the last option for the parties when other solutions are no longer possible (Luiso, 2004, 1205).[14]

Having briefly set forth the general features of mediation, it is important to emphasize that the Italian legislator, by implementing the Directive 2008/52/CE, has introduced an unique regulation with the objective of incentivizing such methods**,** to facilitate the access to and enforce the effects of the conciliation. This discipline has outlined a mediation that has been defined „institutional" (Bove, 2011, 11).

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[12] Even if this mediation involves two distinct parties who have the objective of maximizing their respective rewards, a mediator can create a well-functioning cooperation mechanism in order to convince the parties that conciliation is the best game strategy.

[13] Mediation is considered an alternative to judicial dispute resolution and not an alternative justice system because the content of the agreement is based on an opportunity evaluation by the parties supported by a third party mediator, rather than being based on verifying previous facts and circumstances common to the judicial system (hence an assessment of the parties' interests rather than an assessment of their claims). Arbitration on the other hand is an alternative judicial system because the arbitrator as a judge must frame the award within the pre-existing circumstances and facts without any possibility to make any opportunity judgments (Luiso, 2011, 8; Tiscini, 2011, 3; Bove, 2011, 8).

[14] The author clarifies in particular that a correct and more current approach in relation to the safeguarding of the rights requires that: a) the parties find an amicable solution on their own through the legal tools at their disposal; b) if the parties are unable to do so, they should try to resolve non judicially the dispute with the support of a third party. If this does not work they should take recourse to the judicial or quasi-judicial method; c) firstly arbitration in the event of an arbitration clause, or if not available; d) the judicial courts.

Finally, in order to avoid terminological confusion, the Italian regulatory rules have explicitly identified the outcome of a successful mediation a „conciliation agreement", and not as a settlement agreement. The difference between the two concepts is that the settlement requires a party to waive its claim/rights within the perimeter of the original claims, whereas the conciliation is an agreement that merges the interests of both parties without requiring any waiver.

3.2. Mediation model adopted in the Italian legal system

In the light of the recent regulatory changes (Law Decree No. 69/2013, so-called economic relaunch decree), the Italian legislator adopted a mediation model with the following distinguishing characteristics:

3.2.1.Administered Mediation

The institution provided for in the Legislative Decree No. 28/2010 is an administered mediation, i.e. out-of-court redress mechanism entrusted to mediation organizations, which have to be enrolled in a special register. The mediation organization can only adhere to this registry if they meet the requested legal requirements in term of professional experience, training and good reputation.

3.2.2. Different forms of mediation: facilitative mediation, evaluative mediationand other ADR methods

The legal definition of mediation embraces different ADR techniques: besides the facilitative mediation, by which the mediator merely has a role in easing discussions between parties in finding a conciliation agreement, it also comprises the more interfering form of dispute resolution which allows the mediator to actively evaluate the case and to propose, in his view, a fair and acceptable settlement between the parties (evaluative mediation) (Luiso, 2004, 1216).

The legislator has also introduced some deterrents to induce the involved parties to accept the proposal of the mediator. In the event a court endorses a previously proposed conciliation agreement of the mediator, the court would condemn the party that refused such a proposal to pay the procedural costs, even in case of victory.[15]

It is generally accepted that the scope of mediation is quite broad and encompasses different forms of out-of-court redress mechanisms (such as early neutral evaluation[16], fact finding[17]and non binding arbitration), as long as the third party is not empowered to impose binding decisions or settlements (Maniori, 2011a, 997). The diversity of the available ADR mechanisms is particularly useful and practical in the insurance sector, which is typically impacted by cases requiring the resolution of complex technical questions (Maniori, 2011a, 998).In this regard it is important to underline that, given the facilitating approach of mediation, the mediator does not always require an expert to determine facts in order to take a position. Rather than having a clear view of the facts, the mediator's role is indeed to facilitate the parties to express their own opinion to resolve the dispute. A positive outcome of mediation will consequently produce a reduction of costs: both in terms of direct costs, such as lawyers' fees, external expert reports and employee costs to manage litigation, as well as in indirect costs, such as allocated provisions in case of litigation. Since the major costs of insurance disputes relate to technical expertise, such assessments could not be performed in the preliminary phase of mediation (Maniori, 2011b, 57).

3.2.3. Mandatory mediation and „preliminary meeting"(opt-out model)

In contrast to the other Member States of the Union, Italy has, with some exceptions, chosen for the opt-out model which implies a mandatory attempt to mediate

[15] Pursuant to Article 13 of the Legislative Decree n° 28/2010, „in the event the ruling of the judge corresponds entirely to proposal, the judge must exclude that the winning party who has previously declined the proposal can recover the procedural costs, referring to the period following the proposal, and shall order that such party shall pay the procedural costs of the losing party during the same period as well as the disbursement towards the State of the additional amounts corresponding to the due unified contribution." In this respect, this rule apparently contrasts with the Directive 2013/11 subsequently adopted which excludes any financial penality by confirming that the parties are always free to abandon at any time the ADR proceedings (art. 9, co. 2, a).

[16] The *early neutral evaluation* is a method by which a neutral evaluator must listen and evaluate the underlying grounds of the parties in dispute in order to propose its evaluation, which is neither binding nor judicial, in relation to the validity of the parties' claims and the possible outcome of the dispute. Once the evaluator has expressed its assumption of the possible outcome of the case, the parties are free to find an amicable solution or commence legal proceedings. In the latter case, all information disclosed during the neutral evaluation are subject to confidentiality (Brazil, Gold, Kahn, Newman, 1985, 279–285).

[17] *Fact finding* is a procedure to allow a third party to establish the relevant facts related to the dispute, peruse the case and propose a possible solution.

as a precondition to initiate legal proceedings for certain categories of disputes, including those related to insurance, bank and financial agreements. Further to some recent regulatory changes this opt-out model does not apply for cases related to the compensation for damages arising from accidents involving motor vehicles and vessels.

The decision to apply this mediation model also oninsurance, bank and financial agreements has been motivated by the fact that these contracts, besides their usual lengthy duration, are an important part of the overall litigation in Italy due to their large diffusion among the public.

The mandatory attempt to mediateas a precondition to start legal proceedings is deemed met in the event that a meeting between the litigating parties, their lawyers and the mediator is held during which the parties mustdecide to proceed through mediation to resolve the dispute. After this first attempt meeting, each party is free to opt-out and adhere directly to the Italian courts without any further consequences.[18] Practically the „mandatory" mediation will only continue on a voluntary basis.

Nevertheless, legal commentators continue to criticize this meeting due to the essential incompatibility of any mandatory scheme with the very nature of the out-of-court redress mechanisms, which imply cooperative behavior between the parties (Bove, 2011, 10).In this respect, it is important to highlight that the original Legislative Decree (which in Italy is issued by the government on the basis of guidelines set by a Parliamentary law) has been considered unconstitutional on the grounds that the Parliamentary Law did not provide for any empowerment to the Government to institute mandatory mediation (Constitutional Court No. 272/2012)by which this institution has not been effective for one year. In 2013 the Italian legislator reintroduced mandatory mediation (through Law Decree No. 69/2013), but for a limited trial period of 4 years which is until the end of 2017. The statistical information available on the website of the Ministry of Justice reveals that the stand-still of mandatory mediation has provoked a substantial decrease of, first of all, the number of cases brought before the mediation organizations but secondly, also the number of cases of successful mediation.

In any event it is interesting to note that since the introduction of the mandatory mediation in 2011, 200,000 applications per year have been registered where in other countries (e.g. Germany, the Netherlands, UK, France and Belgium) this number did not exceed 20,000 applications per year. Hence, there are substantial reasons to believe that this mandatory scheme is strictly related to the increase of applications by which it can be said that the policy of Italian legislator to spread and promote the institution of mediation through the opt-out scheme been successful.

3.2.4. Consequences in case of non participation to the mediation

In case a party does not adhere to the mediation process, the courts may use this element in the legal proceedings and condemn such a party to a fine payable to the State (art. 8 comma 4bis).

3.2.5. Mediation ordered by court and the judicial conciliation proposal

The legislator has, within the recent amendments to the decree on mediation, also introduced some redress mechanisms within the legal proceedings (under this profile, the Italian regulatory rules are similar to the „multidoor court-house"[19] used in the United States, that involve an active role of the courts in finding alternative dispute resolutions). I am referring, in particular, to two mechanisms available to the Italian courts, i.e.:

a) The judge can instruct the parties to make a mediation attempt during the court proceeding (article 5, co. 2 Legislative Decree No. 28/2010, as amended by Law No. 98/2013). This is also considered a mandatory mediation, although not imposed by law but by the judge. In this case, the parties have to start mediation procedures as a precondition to continuing the judicial proceeding.

b) The judge has the right to make a settlement or conciliation proposal to the parties (article 185bis Civil Procedure Code) in the event (s)he identifies a possibility to resolve the litigation in relation to legal dispute that can be easily and promptly resolved.

Although there might be some legitimate doubts related to the possible risk of improper use of the above institutions by the courts[20], these mechanisms to

[18] The original model proposed by the legislator compelled the parties to adhere to or refuse the mediation procedure, without having the possibility to verify whether the parties had any interest in following such a procedure. Such a model was considered by many authors as too coercive (Santi, 2014, 1105), while the mitigated mandatory mediation has received more positive reactions from the authors and other mediation experts in other European countries.

[19] For an overview of the ADR developments within the Federal Courts of the United States, refer to De Palo, Guidi, 1999, 113.

[20] Many authors have criticised compulsory mediation by the judge as a possible system by which the parties are *de facto* prevented from having a right to receive judicial protection, being an potential incentive to exclude the parties from the

enhance the role of the judge are undoubtedly beneficial not only for it ability to reduce the judicial workload but also to encourage a conciliatory culture and to come to an efficient and effective integration between mediation and ordinary judicial proceedings. It could therefore be useful to track the real application of these redress mechanisms within the power of the judges by, for example, including the use of these instruments in the judicial statistics which the courts have to disclose.

3.2.26. The conciliation agreement is directly enforceable with the signature of the lawyers of the Parties

According to article 12 of the Legislative Decree No. 28/2010 the conciliation agreement acts as a title to legally enforce the content of the agreement by means of expropriation (to fulfill or forbear an obligation and allow a judicial mortgage to secure compliance with the conciliation agreement).

The conciliation agreement must be executed by both the parties and their lawyers in order to be enforceable. The underlying motivation is that the lawyers' presence should guarantee a legal check that the conciliation agreement does not conflict with Italian public order and other mandatory regulatory rules.

It is noteworthy to stress the importance given to the role of the lawyers in the mediation procedure in the latest reform which, to a certain extent, apparently conflicts with the European Directives on ADR which excludes regulations that oblige parties to be assisted by a lawyer, whereas the Italian regulatory rules provide for the necessary presence of parties' lawyers during the mandatory mediation procedure.[21]

The lawyers have hence obtained in Italy a preponderant role in the assistance of their clients in the mediation procedure, where this role should maybe have been given to the mediation organizations. It is questionable whether the presence of the lawyers is beneficial to the cooperation between the parties, which is a pre-requirement in order to reach a conciliation agreement.

3.2.7.Territorial jurisdiction

Article 4 of the Legislative Decree No. 28/2010, as recently modified, has instituted the obligation that the mediation request should be lodged with the mediation organization of the place of the competent jurisdiction.

It is generally accepted that the parties may derogate from the territorial jurisdiction, as established by laws for litigation.

3.2.8. Confidentiality obligation

Art. 9 of Legislative Decree no. 28/2010 provides for specific confidentiality obligations for all parties involved in the mediation, in relation to the declarations made and information acquired during the process.

3.3. Disputes in relation to circulation of motor vehicles and vessels

An argument of particular interest remains the exclusion of disputes in relation to the circulation of motor vehicles and vessels from the list of items subject to mandatory mediation, whereas disputes related to insurance agreements remain subject to such discipline. This exclusion is also motivated on the basis of statistical evidence collected by the Ministry of Justice, demonstrating that defendants in car insurance disputes do not appear at the mediation table in the majority of cases. In any case, the inclusion of insurance agreements in the list of matters subject to mandatory mediation raises some questions relating to the qualification of disputes under the category of insurance agreements.[22] With particular reference to the motor insurance, a distinction should be made between disputes related to claims grounded on non-contractual liability and those based on the agreements between the insurer and the insured party (e.g. disputes on the covered risks, non compliance with the transparency obligations, etc). Only the latter fall under the mandatory mediation scheme.

courts and in any event give rise to undue procedural delays (Bona, 2015, 92).

[21] Under the voluntary procedure, this assistance is not required, but the parties, in alternative to instituting a specific recognition procedure before the Italian courts to give the conciliation agreement legal enforceability, may request their lawyers to execute the agreement in order to give it legal enforceability.

[22] Among such questions, we stress the issue of whether it is necessary to refer to the subjective-professional nature of the insurance company, or whether it relates to the intrinsic insurance nature of an insurance agreement. The most recent case-law confirms the first solution, by which the mediation procedure should be done for any insurance product that is offered to the public; this implies that also surety policies, bank and financial contracts fall under this category. Decision in such sense, Court of Milan, 16 March 2012 (Hazan, 2014, 93). Another issue concerns the applicability to disputes related to the pre-contractual phase, such as violations of the duty to inform before entering into an agreement by the insurance company or the intermediary person (Landini, 2013, 28), who argues that a violation of the duty to inform the insured person, can potentially qualify as a material misrepresentation by which the insurance contract can be declared null and void.

The disputes related to insurance agreements (such as items related to abuse or incorrect use of black box in cars– Hazan, 2014, 93)are mainly administrated through the existing complaint procedures provided for by the insurance companies, or by the procedures set forth by Ivass.[23] In case of unsuccessful result, any legal proceedings must be anticipated by a mandatory mediation process (at least a preliminary meeting).

3.4 Disputes in banking and financial sectors

Although this paper has a particular focus on the insurance sector, a brief overview is given in relation to the ADR methods available in the banking and financial sectors which have been a benchmark for the new mediation procedures introduced by the Italian legislator. The ADR methods in this sector remain to date a valid alternative to the conciliation proceedings available under the Legislative Decree no. 28/2010. In particular art. 128-*bis* of the Italian Consolidated Banking Law provides for an Arbitrator for banks and financial institutions (ABF) administrated by the Bank of Italy. This ADR method has been successfully applied in disputes between consumers and bank and financial institutions but is distinct from mediation provided that the decisions of this independent body must be at law and cannot go beyond the original claim. It is neither equal to common arbitration procedure since ABF cannot issue a binding decision leaving the option open for the parties to adhere to judicial or extra judicial proceedings to resolve the dispute. However in case the bank or financial institutions do not respect the decision of ABF, it is made public. This particular feature besides that lawyers are not required within the ABF proceedings, has made this institution particularly appealing and it has been already requested to extend its application to the insurance sector.

4. ASSISTED NEGOTIATION

The assisted negotiation is an ADR mechanism that aims to find a settlement agreement, providing a direct enforceable title and avoiding as such legal proceedings. In contrast with mediation, this mechanism is new to the Italian system, and it is difficult to predict how effective this institution will be.[24]

This new out-of-court redress mechanism stems from North-American collaborative Law and from the model of the „convention de procedure participative" introduced in the French legal framework by law No. 2010–1609 of 22 December 2010[25], although the Italian regulatory rules deviate from the French model.

4.1. The agreement to cooperate in a fair way

The commencement of the procedure requires an agreement in writing *ad substantiam*, which terms include an undertaking by the parties to cooperate in a fair way to reach an amicable solution to the dispute, either with the assistance of their respective lawyers or by a sole jointly appointed lawyer. Again it remains remarkable how much weight the legislator has given to the role of lawyers in this procedure.

The agreement obliges the parties to negotiate, and will be null and void in case it is not formalized in writing.[26]

The breach of the cooperation undertaking as well as the confidentiality obligations related to the disclosed information by the parties during the procedure, is subject to contractual responsibility under art. 1218 of the Italian civil code (Bona, 2015, 17).

The agreement must include the description of the dispute (which may not pertain to non-disposable rights or labour disputes), as well as the duration within which the parties intend to complete the procedure, which in

[23] On the basis of Regulation Isvap (nowIvass) dated 19 May 2008, No. 24.

[24] The difference between mediation and assisted negotiation consists mainly in the presence of a third impartial party (appointed by the mediation organization) which may facilitate or propose a solution to the dispute, whereas assisted negotiations do not provide such a figure since the negotiations are directly managed by the parties with the assistance of their lawyers. It must be said that the mandatory involvement of lawyers also in the mediation procedure has created an overlap of the two institutions.

[25] In recent years, collaborative law has very much spread in the United States, Canada, Australia and Europe and was particularly successful in family matters: the lawyers assist their clients in order to find a consensual solution for the dispute, agreeing not to adhere to the judicial courts during the conciliation procedure, and to accept confidentiality obligations related to the information revealed and disclosed during the negotiations. Such practice has not been regulated except for in France, which has included this method as an ADR mechanism, and now Italy that has been influenced by the French system, although this was only partially adopted. The Italian model is different from the French one firstly because it provides that the assisted negotiation is a condition to be able to commence judicial proceedings, whereas in France it is a mere alternative dispute resolution method for the parties (Bona, 2015, 99) and secondly, in that Italy has expressed its preference for the mandatory mediation procedure, unlike the French legislator that has given the different ADR methods the same legal value.

[26] In case the agreement is not executed or is voidable, it may still be considered to have legal value as conciliation or settlement, but it cannot benefit from the legal advantages recognized by law (the contract shall not be directly enforceable).

turn implies a corresponding obligation to refrain, during such period, from commencing legal proceedings.

4.2. Enforceability of the agreement that resolves the dispute

In case the procedure has been successfully concluded in compliance with the formal legal requirements[27],the agreement that resolves the dispute qualifies as an enforceable title without any further need for a judicial recognition, provided that it is executed both by the parties and by their lawyers.

4.3. Different forms of assisted negotiations

The Italian regulations provide for three different forms of assisted negotiation: the voluntary procedure (art. 2, co.1 Law Decree 2014/132); the mandatory procedure (art. 3) and the procedure in family matters (applicable for consensual solution in case of separation and divorce, and the modification of the terms of such separation or divorce /art. 6/).

In contrast with the French model which does not consider the mandatory procedure, the assisted negotiation is a pre-condition to commence legal proceedings[28] in the following cases: disputes related to compensation for damages caused by motor vehicles and vessels (article 3, co. 1) and disputes related to monetary payments on „whatever basis" amounting to less than fifty-thousand Euros.

4.4. Mandatory procedure

The mandatory procedure is not applicable to claims related to contractual obligations deriving from agreements between traders and consumers (art. 3, co 1), as well as disputes which fall under the mandatory mediation (according to art 5, co. 1-bis, del D.lgs n. 28/2010), which however can theoretically be followed by an assisted negotiation. It is therefore evident that the Italian legal framework on out-of-court redress mechanisms favours the institution of mandatory mediation in contrast to the French regulations that give the same weight to the different ADR mechanisms.[29]

In the event the assisted negotiation procedure is mandatory, the pre-condition to proceed with legal proceedings is deemed fulfilled in the event the invited party does not adhere or refuses within 30 days. In those cases, the court may consider the position of the invited party in order to determine the allocation of the procedural costs.

4.5. Critical aspects of the assisted negotiation

The main distinction between the assisted negotiation procedure and other ADR techniques is the requirement of an agreement which obliges the parties to negotiate, and which will be null and void if not preceded by an agreement in writing(i.e. procedural agreement).

Legal commentators have given a rather negative opinion of the formalization of this mechanism, since it increases the risk of additional disputes between the parties, even without grounds, or with the mere intent of further delaying the process, in relation to presumed irregularities of the collaboration agreement (Consolo, 2014,1177; Bolognesi, 2014, 3). However, it should be pointed out that this mutual understanding *ante causam* and hence a specific procedural agreement, is a useful tool to define the extension of possible future legal proceedings.

Further objections have been expressed in relation to the motor insurance. Whereas this sector is highly impacted by a high level of litigation attributable to the important number of accidents as well as to speculative and fraudulent behaviour of some insured parties, the Italian legal framework related to private insurance has already set forth a mandatory conciliation procedure which compels the parties to collaborate to find an amicable solution to the dispute.

Article 145 of the Private Insurance Code (CAP) has specific provisions that damage actions caused by motor vehicles and vessels can only be commenced after the elapse of acertain time period (i.e. 60 days in case of material damage and 90 days in case of

[27] The agreement may be reached through the initiative of all parties to the dispute, or by only one party, which latter shall invite the other party to execute the agreement through its lawyer.

The notice of the invitation to execute the agreement, or the execution of the agreement, have the same effect on the statute of limitation as if they were a judicial claim.

The Parties have to define the period to complete the procedure which may not be less than one month and not longer than three months. This period can be extended for an additional 30 days by mutual agreement by the parties. The judge may take the silence or declination of the other invited party into account when assigning procedural costs to the parties.

[28] The preclusion of judicial review must be raised by the respondent or directly by the judge not later than the first hearing.

[29] Mediation is not an alternative to renegotiation, nor are those two ADR tools in direct competition with one another, but they are intended to live together with, in principle, no risk of overlapping since the legislator has specified to give preference to the mandatory mediation. While for all matters mandatory mediation is available, the parties must *a priori* select the assisted negotiation, notwithstanding the obligation to make a mediation attempt in the event that the assisted negotiation fails.

personal injury) from the damage claim to the insurance company under article 148 CAP, which is applicable both in the case of the direct compensation procedure (articles 149 and 150 CAP) and the ordinary compensation procedure (article 148 CAP).

By rendering the assisted negotiation mandatory in relation to disputes related to compensation for damages caused by motor vehicles and vessels, the legislator has worsened the procedural strain (Martini, 2014), rather that diminishing it. This furthermore involves an increase in costs for the parties[30],since the mandatory assisted negotiation requires inevitably the presence of a lawyer, which is not requested under the compensation procedure set forth in the Private Insurance Code.

5. PROSECUTION OF THE LEGAL PROCEEDINGS IN ARBITRATION

The Law Decree 2014/132 introduced to the Italian Civil Procedure Code, the possibility for parties to continue existing judicial proceedings through a binding arbitration procedure, the so-called "prosecution in arbitration."

Arbitration is the most traditional alternative to litigation in court, and in many aspects is alike in that it is driven by the same dynamics as classic legal proceedings, i.e. one party wins and the other one looses.

Arbitration can only be instituted if the parties previously agreed to waive ordinary jurisdiction, chose to submit the dispute to a third party and accept in advance the award of the arbitrator or arbitration panel which has the same legal value as a judicial decision.

The distinctive character of the prosecution in arbitration resides in the possibility for the parties to choose a private „judge", even after the litigation was originally presented before a public judge, and to introduce the pending procedure in the current *de facto* and *de iure* situation with its related limitation periods and other procedural restrictions.

Although this institution could reduce the duration of the litigation, it presupposes a collaborative behavior by the parties to continue litigation through arbitration.[31] Without any particular incentives to this institution (for example tax benefits[32]), it is doubtful that this institution will be of any interest to the parties.[33]

6. CONCLUSIONS

It is probably too early to make any forecast of the attractiveness and effectiveness of the recently introduced ADR methods. What can be said is that currently there is no well-established mediation and negotiation culture in Italy to resolve disputes out of court.

In this context, the policy to introduce temporary mandatory models for certain disputes is an interesting attempt to boost ADR in Italy and increase awareness of these methods, not only for private citizens but also for lawyers and judges. Theoretically the two ADR mechanisms are not in competition, because the law gives preference to the mandatory mediation system. However, a risk of overlapping exists concerning claims on compensation for damages resulting from car accidents, because there are already mandatory claim management systems available before commencing legal proceedings: the mandatory assisted negotiation procedure renders the dispute resolution in this area more burdensome.

Furthermore, providing for assisted negotiation in all matters not covered by mandatory mediation, is a certain obstacle for expansion of voluntary mediation. Maybe in these cases it would have been better to have the institution of assisted negotiation as merely optional to the mediation.

On the other hand, the legislator has demonstrated a willingness to value the expertise of the lawyers, with particular regard to the assisted negotiation mechanism. The lawyers are called not only to use their professional skills to develop the factual context and the legal basis of the claim but also to shift their mindset from a pure litigator into a negotiator, which is not purely based on a mere win or lose principle.

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[30] This raises the question of whether the damaged person may commence the assisted negotiation before or after the *spatium deliberandi* provided for in art. 145 cap, or whether he/she has to wait for the terms to expire (or even the expiry of the terms of the insurance companies to present a compensatory proposition or notify a denial of responsibility or compensation).

[31] Several authors doubt the effective interest of such institution for the parties, and criticize some holes in the legislation: for example, nothing is mentioned in the event that the arbitration procedure can be concluded without an award. In such case, it is unclear whether it would be possible for the parties to resume the judicial proceedings, or whether they should continue an arbitration proceeding (Consolo, 2014, 1176).

[32] The only incentive relates to the provision in the Decree, which provides for a reduction of the parameters to determine the arbitration fees. In this respect, specific regulations by the Ministry of Justice should be published in order to do so.

[33] Some authors propose *de iure condendo,* that the refusal to assign the judicial case to arbitration may be considered by the courts to determine the allocation of procedural costs (as provided for the assisted negotiation) (Prandi, 2014).

Nevertheless a legal conflict does exist since the Directive 2013/11/EU on alternative dispute resolution for consumer disputes rules that the presence of a lawyer cannot be made compulsory by the Member States, whereas the Italian institution of assisted negotiation and mediation, does require lawyers as essential for their functioning. This mismatch between the existing legislation and the Directive shall have to be resolved by the Italian legislation.

It goes without saying that the success of mediation is directly linked to the credibility of the mediators and the related costs of the institution.

The mediators must be recognized as having authority and expertise, which is the reason why much emphasis has been placed on professional training programs also to overcome, for example the legitimate doubts of insurance companies that a mediator has the necessary qualifications to deal with the complex issues of the sector both from a legal point of view as well as a technical point of view.

The mediation organization must also guarantee neutrality and impartiality. To this end, the Italian legal system has provided for strict rules regarding conflicts of interest (Legislative Decree No. 139/2014).

In order to acquire the necessary interest, the mediation must ultimately also be convenient from an economic point of view. Hence, the cost barrier to access the mediation must be low, but on the other hand in order to find mediators available to invest in training, they must have the right to reasonable profit.

Finally, we recall the numerous advantages of consolidating mediation in the insurance sector, such as cost savings, preventing long technical expertise, tax incentives and last but not least a less conflicting relationship with the insured parties which can enhance fidelity.

SUMMARY

The goal of this paper proposed by the author is to underline the importance of the out-of court redress mechanisms in Italy in order to improve the efficiency and functioning of domestic judicial system, with particular regard to the insurance sector in consideration of the important information discrepancies, that typically affect the relationship between the insurer and the insured party, that gives rise to a high level of disputes. After a short overview of the legislative tools that have been implemented at European level, the author proceed with an outline of the most important ADR methods available in the Italian legal system: 1) Mediation with the aim of entering into a conciliation agreement in civil and commercial matters; 2) Assisted negotiation procedure with the support of one or more lawyers; 3) Prosecution of the legal proceedings in arbitration.

The author has examined the particular features introduced by the Italian legislator related to the first two above ADR mechanisms, which includes different compulsory schemes with the aim to spread more efficiently the general culture of mediation in Italy.

The author has nevertheless identified some overlap of compulsory schemes with particular reference to the compulsory procedure related to the assisted negotiation in the event of motor insurance issues where the legislator has already set forth a mandatory conciliation procedure for the parties to collaborate to find an amicable solution to the dispute.

In its final considerations, the author welcomes to efforts of the Italian legal system to promote the mediation institution but also highlights the necessary conditions that should be met in order to be successful.

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