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The alternative dispute resolution system in Italy: between harmonization with the requirements of European markets and de-juridicalization

Giampiero D'Alessandro
Numero parole
Via Francesco Cilea, 102
80127 – Napoli (Italia)
+39 0816583358
gda@studiodalessandro.com

1 Introduction

The topic of Alternative Dispute Resolution is comprehensively presented in Italy because of two different demands. The first is a demand presented at the European level to adopt measures that are meant to align the legal and regulatory provisions of different member States, even through the development of alternative methods for dispute resolution,[1] in order to guarantee better access to justice at large, and this can be done through the use of supplemental and alternative dispute resolution methods which are of equal dignity to court proceedings.[2] The second demand is presented at the national level and aims respond to the slowness of local court proceedings through so-called de-juridicalization,[3] where legislations pertaining to A.D.R were supplemented with emergency measures that now include alternative tools among them.

1 Article 81, para. 2, point g). Treaty on the Functioning of the European Union.

2 Taking into consideration Directive 2008/52/EC of the European Parliament and Council on civil and commercial mediation according to which "[t]he objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods".

3 See Legislative Decree No. 132 of 12 September 2014 (converted into Law No. 162 of 10 November 2014), on "Emergency de-juridicalization measures and other interventions for the resolution of backlog in matters of civil procedures" that introduced the option to transfer to an arbitration court cases pending before judicial authority (Article 1), as well as the new institution of lawyer-assisted negotiation procedures (Articles 2 *et seq.*).

This complex tableau led to the creation of very detailed tools for dispute resolution on the civil front, tools that were often borrowed from foreign experiences. This paper wishes to offer a general framework of the principal players, without necessarily being exhaustive. In fact, in addition to Arbitration, which finds its origins in the Civil Code, Italian regulators have added over time procedures for civil and commercial mediation, assisted negotiation, settlement procedures for over-indebtedness crisis and mediation on matters of energy and telecommunications and, more in general, on consumer matters.

Some of these tools take on a principally deflationary function on matters of civil disputes where these same tools are considered necessary and constitute a condition of admissibility to be able to start legal proceedings.

Faced with this complex tableau, in 2016 the Italian Ministry of Justice established a research committee,[4] composed of professors, judges, lawyers and notaries who were entrusted with the task reassessing organically the matter with the aim of developing "de-juridicalization" tools using mediation, assisted negotiations and arbitration.

In January 2017, this Commission, at the end of its tenure, presented a series of proposal to modify the legislation that was then in force. These proposals are to this day still under consideration by the Ministry of Justice.[5]

The establishment of the aforementioned Commission seemed justified because of the imminent termination of the implementation period for the compulsory mediation required by law for some disputes on civil and commercial matters, pursuant to Article 5, para. 1-bis, of Legal Decree 28/2010[6] that, instead, found a solution after changes made to convert Legislative Decree No. 50, April 24, 2017,[7] through the so-called corrective action of 2017, into Law No. 96 of June 21, 2017.

4 The aims of the Commission established by the Ministry of Justice can be read online (https://www.giustizia.it/giustizia/it/mg_1_36_0.page?facetNode_1=1_9(2016)&contentId=COS119700&previsiousPage=mg_1_36) where are listed the objectives of this commission on the "development of an organic law and reform of de-juridicalization, paying particular attention to mediation, assisted negotiation and arbitration".

5 The final report of the Commission, presided by Professor Alpa, whose name the report bears, is available on its website https://www.mondoadr.it/wp-content/uploads/TESTO-FINALE-Commissione-ALPA-Aggiornato.pdf.pdf.

6 This provision, re-introduced by Law No. 98 of August 2013 (converting Law No. 69 of 21 June 2013), in fact foresaw an implementation period of 4 years for the compulsoriness of mediation from the entry into force of the converting law.

7 In fact, the conversation of Decree-Law No. 50 of 24 April 2017 introduced Article 11 ter which suppressed points three and four of Article 5, para. 1 bis which contained the expectation of a limitation period for compulsoriness.

Following this law, the mediation became definitively compulsory for all disputes listed in Article 5, para. 1-bis of Legislative Decree 28/2010,[8] although with some exceptions referred to below.

2 Arbitration

Arbitration is a dispute resolution method where the parties, in exercising their negotiation autonomy and as an alternative to ordinary court proceedings,[9] may confer to one or more subjects (arbitrators) the power to adjudicate disputes related to any available rights[10] through a binding decision (award), issued after the conclusion of a procedure that respected the equality between the parties and their guarantee of the right to be heard.

The arbitrator constitutes, therefore, a heteronomous, non-judicial tool for dispute resolution whose decision is reached based on the evaluation of the foundation of the legal claims brought forward by the parties.

The Italian Code of Civil Procedure allows for two principal forms of arbitration: binding arbitration and informal or free arbitration.

In binding arbitrations, the award issued at the end of the procedure has the same effect as a judgement issued by judicial authorities. (Article 824-bis of the Italian Code of Civil Procedure).[11]

In cases of informal arbitrations, which have only recently begun to receive legal consideration, however, the parties can establish in writing that the dispute may be resolved by arbitrators through a contractual determination (Article 808 of the Code of Civil Procedure).[12]

In both cases, arbitration determine that they will refer their dispute to arbitration and thus will waive access to national jurisdiction.

Nevertheless, the fundamental difference between these two forms is not based on fact that in binding arbitrations the parties allow the arbitrator to

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8 Article 5, para. 1-bis of Legislative Decree 28/2010 "Whomever intends to preset in court an action regarding condominiums, property rights, partition, succession arrangements, family arrangements, leases, loans, business leases, compensation of damages resulting from medical and health liabilities and from defamation through the press or other means of publication, insurance, banking and financial contracts, is obligated, through the assistance of his lawyer, to preliminarily resort to mediation [...]".

9 The devolution of a dispute to arbitration involves the renunciation of state jurisdiction with the consequent unconstitutionality of any informal arbitrations. (Constitutional Court of 8 June 2015, No. 221).

10 G. SCHIZZEROTTO, *Dell'arbitrato*, Milano, 1988, p. 75. The distinction between available and unavailable rights rests on the fact that available rights are protected by the legal system which features dispositive regulations to protect the power and self-determination of the parties, while the latter are protected by mandatory rules for the protection of the overriding public interest.

11 Article 824-bis, Code of Civil Procedure – "[...] the award, from the date of its latest signing, will have the same effects as a ruling issued by a judicial authority".

12 This provision, introduced with Legislative Decree No. 40 of 2 February 2006, qualifies explicitly as informal arbitration the tool through which the parties jointly decided that the dispute be solved by the arbiters through a "contractual determination".

replace the functions of a judge, but rather it's based on the fact that, while in binding arbitrations (through the observation of the formal arbitration procedure) the parties undertake to agree to an award that is likely to be enforceable and to produce the effects referred to Article 825 of the Code of Civil Procedure,[13] in informal arbitrations the parties expect the arbitrator to solve the dispute through negotiation, through an out-of-court settlement or through a verified transaction attributable to the will of the parties themselves.

Furthermore, while the binding award may be challenged following the procedures referred to in Article 827 of the Code of Civil Procedure,[14] the contractual determination established by an informal arbitrator cannot be contested through an ordinary first-degree cognizance process.

Arbitration, though already known in our constitution, until today has seemed like a tool that is rarely used by companies and individuals, mostly due to its elevated costs. At the moment, it seems to have been revived because legislators considerate a tool that will contribute to the elimination of the massive civil backlog accumulated throughout the years in Italian courts.

Informal arbitration also relies fundamentally on the autonomy of the parties, and thus in the consensus expressed voluntary by the parties to refer the settlement of the dispute between them to an arbitrator or to an arbitral tribunal, rather than an ordinary court.

2.1 The legal status of arbitration

On the legal status of arbitration, Italian doctrine has been divided over time between those that consider it a jurisdictional tool and those that recognized binding arbitration as a private tool.

This debate finds its origins in the interpretation of Article 102 of the Italian Constitution, which was deemed to express the monopoly of the state over jurisdictional solutions,[15] and because of the oscillation in the jurisprudence of legitimacy.

There were those who asked, in other terms, if during a binding arbitration, arbitrators exercise the same jurisdictional function that legislators reserve for

[13] Article 825 of the Code of Civil Procedure "The party that wishes to carry out the award within the territory of the Republic will make an application by depositing the original or a certified copy, together with the document containing the arbitration convention, original or a certified copy, at the Registry of the competent court for the arbitration in question [810, 816]. The court, once verified the formal validity of the award, will issue a decree to enforce it".

[14] Article 827 the Code of Civil Procedure "The award is subject only to an application for annulment, revocation or third-party proceedings".

[15] Article 102 of the Italian Constitution. "Judicial office is exercised by ordinary judges established and regulated by the laws on the judicial system".

national judges, and if they have jurisdiction that would lead them to be in conflict with ordinary judges.[16]

Initially, the jurisprudence of the Constitutional Court,[17] and the jurisprudence of legitimacy, was in favor of the jurisdictional nature of binding arbitrations, whose awards, once enforced by a judge, were deemed to have the same enforceable effects as court rulings.

Because of such an interpretation, to establish if a dispute should be heard by an ordinary judge or an arbitrator was only a question of jurisdiction.[18]

Successively, the Court of Cassation changed orientation, affirming that arbitration does not exercise a jurisdiction function, one that would substitute state jurisdiction, but that it is, on the contrary, of a private nature.

The justification for such a change in orientation was based on the modifications made to the concept of arbitration by Law No. 25/1994 that had in fact eliminated the phrase "*sentenza arbitrale*" (arbitral award), sustaining thus the thesis that considered arbitral awards an act of private autonomy, whose effects are derived from a decision issued by a subject whose power originates in the appointment made by the parties. Therefore, to cite the Court of Cassation "the possibility to refer to arbitrators as judicial organs of the State is excluded".[19]

Since arbitrators do not have judicial power, which the law attributes only to state judges, establishing if a dispute belonged to the purview of an ordinary judge or if it was deferrable to an arbitrator, was no longer a matter of competence, but of merit, "since it was directly inherent on the validity and interpretation of the compromise or the arbitration clause".[20]

This latest orientation was revisited by the Unite Sections of the Court of Cassation in sentence n. 24153 of 2013[21] that established that the actions of binding arbitrators have a judicial nature and substitute the functions of an ordinary judge. Therefore, to establish if a dispute should be referred to an arbitrator or to an ordinary judge becomes again a question of jurisdiction.

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16 Court of Cassation, Section I, 25 June 2002, No. 1097, in Giust. civ. mass., 2002.

17 Decision No. 2 of the Constitutional Court of 12 February 1963 where the Court confirmed the legitimacy of the rules on arbitration in relation to Article 102, as according to these norms the award is enforceable, although through a decree issued by a state judge.

18 To this effect, among others, Civil Cassation, Section I, 11 January 1980, No. 242, in Giust. civ. mass., 1980, vol. 1; Civil Cassation, Section I, 4 July 1981, No. 4360, in Foro it.,1981, I, p. 1860; Civil Cassation, Section I, 7 February 1987, No. 1303 in Giust. civ. mass., 1987, vol. 2; Civil Cassation, Section I, 2 June 1988, No. 3767, in Giust. civ. mass., 1988, vol. 6.

19 Civil Cassation, Section I, 3 August 2000, No. 527, in Foro pad.2001, I, p. 251; to the same effect, among others, Civil Cassation, Section I, 5 December 2000, No. 1251, in Riv. Corte Conti, 2000, vol. 6; Civil Cassation, Section I, 11 June 2001, no. 7858, in Dir. e prat. Soc. 2002, 9, p. 86.

20 Civil Cassation, Section I, 3 October 2002, no. 14223, in Dir. e prat. soc., 2003, 17, p. 86.

21 Civil Cassation, Section I, 25 October 2013, no. 24153, in Corr. giur.1, 2014, pp. 84-99, with commentary by G. VERDE, Arbitrato e giurisdizione: le Sezioni Unite tornano all'antico ("Arbitration and jurisdiction: the Unite Sections return to their old ways").

According to the Court of Cassation the law itself, partially introduced by Law No. 25/1994 and partially introduced by Legislative Decree No. 40/2006, "contains sufficient indicators to recognize the judicial nature of the arbitral award, and to satisfy those indications on the extent to which the choice of a non-state judge can, by law, be entrusted to the autonomy of private entities".

Another indicator that sustains the judicial nature of the arbitral award is the fact that based on the reforms of 1994, for example, the request of legal remedies pursuant to Article 827, para. 2 of the Code of Civil Procedure, no longer relies on the issuance of an enforceability decree for the award: the award, in fact, is automatically challengeable independently of its registration.

The Court of Cassation further clarifies that legal authority over rights is exercised, generally, through ordinary judges; nevertheless, the parties are allowed, in the exercise of their own autonomy, to derogate from such rules and act to protect their available rights before private judges, as recognized by law, and in the presence of determined guarantees.

The decision in the United Divisions of the Court of Cassation in 2013, later reacts to decision No. 223 of the Constitutional Court of 2013,[22] where is affirmed the jurisdictional and substitutive nature, in lieu of ordinary judges, of the actions of binding arbitrators.

According to the Constitutional Court, it is undeniable that, with the 2006 reform:

> the legislation has introduced a series of laws that confirm the assignment to arbitral judges of a substitutive function of public justice. Although binding arbitration remains a phenomenon that implies the renunciation of public justice, it still borrows from certain mechanisms of public justice in order to provide a result that has effects that are substantially analogous to the dictum of a state court.

With this decision, the Constitutional Court has also stipulated the constitutional illegitimacy of Article 819 ter, para. 2 of the Code on Civil Procedure, in the paragraphs where this article excluded the applicability, in the relation between arbitration and courts, of the rules referred to in Article 50 of the Code on Civil Procedure.

[22] Constitutional Court, decision no. 223 of 9 July 2013, (*Corr. Giur.* 2013, 1107 ss.; with commentary by C. Consolo) which admitted the so-called *translatio iudicii* between judges and arbitrators observing that "within the scope of a law that explicitly recognizes that parties can protect their rights by also going through arbitrators whose decisions is just as enforceable as a decision issued by a judge, the error committed by the claimant in individuating as judge rather than an arbitrator as competent should not prejudice the possibility of obtaining, a settlement of the dispute from the competent body".

In fact, Article 819 *ter*, para. 2 of the Code on Civil Procedure, in the portion annulled by the Court of Cassation, in not allowing for the applicability of Article 50 of the Code on Civil Procedure, did now allow the case to proceed to the competent arbitrator or judge. Following such a decision, instead, the possibility that a procedure introduced in front of an incompetent arbitrator or judge could now be "pursued" before a judge or arbitrator deemed competent was again recognized, without prejudice to the procedural and substantial effects resulting from the originally proposed request.

The affirmations of the Constitutional Court and the more recent case law coming from the Court of Cassation, are coherent with a more updated reading of Article 102 of the Constitution, now no longer holding the meaning that jurisdiction is a function exclusive to the State, but rather that it is a service that the State provides through its judiciary, but that can also be provided by various subjects to whom the parties, within the limits of their available rights, can address to obtain justice.

2.2 Consent to arbitrate and typologies

Consent to arbitrate can be expressed by the parties in advance through a contract stipulated between them, or through a separate act, with regard to future, as yet to be determined, disputes (arbitration clause), or through a subsequent agreement, once an argument has risen between them (compromise).

The distinction between *ad hoc* arbitration and institutional arbitration is important.

Ad hoc arbitration is a procedure that is entrusted to arbitrators according to procedural rules agreed directly by the parties with regards to a single dispute. Through *ad hoc* arbitration, the parties can agree on the nomination procedure for the arbitrators, on the place of arbitration, on the schedule and cost of the arbitration and so on.

In case of administrative or institutional arbitration, the parties decide to address a determined arbitral institution and to apply the procedural norms of the regulation adopted by said institution.

During institutional arbitrations, the role of the arbitral institution is of particular importance as its acts to overcome the inertia or disagreement between the parties on particular questions that may impede the regular implementation of procedures (e.g., in case of conflicts between the parties on the nomination or compensation of the arbitrators) and, in any case, to guarantee the correct application of the procedural rules.

The advantages of institutional arbitration consist in the fact that the procedural norms contemplated by such organizations are known *ex ante* by the

parties and, in general, have been tested through practical use. Costs are generally higher compared to those of an *ad hoc* arbitration because of the costs paid for the services offered. Furthermore, arbitral institutions are generally guaranteed to be more reliable.

2.3 Transfer to arbitration courts of cases that are pending in state courts

In the scope of the so-called de-juridicalization, Article 1 of Legislative Decree No. 132/2014, converted, through modification, into Law No. 162/2014, aimed at the elimination of backlogs of cases pending before Italian judges, gives parties the option, through a joint motion, to request an arbitration in accordance with Code of Civil Procedure, by transferring a civil dispute pending before an ordinary judge to an arbitration court.

The transfer of a pending dispute to an arbitration court requires the fulfilment of the following conditions: a) the so-called *translatio iudicii* must be requested jointed by all parties; b) the case must be a civil dispute pending in court or appeal at the date of the entry into force of the aforementioned legislative decree; c) the dispute must concern available rights; d) no decisions has been made on the case.

Are excluded from the *translatio iudicii*, disputes concerning unavailable rights, those pending before the Justice of the Peace or the Court of Appeal, when this latter decides in one degree, disputes concerning labor legislation, social protection and assistance, excluding labor disputes that concern "rights that originate from a collective agreement, if the contract itself has foreseen and is governed by an arbitral clause".

A joint motion is not always necessary. In fact:

> for disputes valued at no higher than 50.000 euros and concerning non-contractual liabilities or related to the payment of sums of money, in cases where a public entity is party to a case, this latter's consent to the request to move to arbitral proceedings made by a private party is considered given, unless the public entity expresses its written objection within thirty days of the request.

Following such a request, the judge, after verifying compliance with the conditions listed above (and without prejudice to any purported forfeitures or losses) has the right, for the purposes of nominating the arbitrators, to transmit the file to the President of the Council Bar Association that has the appropriate jurisdiction.

The value of the dispute affects the composition of the arbitral body, since, if the dispute has a value of over € 100.000,00, if the parties agree on it, an arbitration panel will be appointed. If the dispute has a value lower than € 100.000,00, a single arbitrator will be nominated.

The procedure will proceed before the arbitrators, without prejudice to the substantial and procedural effects produced by the judicial request.

The institution in question operates also at the appeals stage, as determined by Article 1, para. 4,of legislative decree No. 132/2014. In this case, if the arbitral proceeding is not concluded with the issuing of an award within one hundred and twenty days from the nomination of an arbitrator (or arbitral panel), the appeals decision must be summarized within the next sixty days at the latest, under penalty of nullity and within the application of Article 33 of the Code of Civil Procedure, which usually involves the final transfer of the first instance sentence. In the event of reinstatement, an award can no longer be issued. The arbitrators, nevertheless, upon agreement between the parties, may request that the deadline for the issuing of an award of be extended for thirty more days.

2.4 The future of arbitration

Although there seem to be many benefits that may lead companies and private subjects to prefer arbitration compared to ordinary procedures, even when taking into consideration the process of globalization, the data on the use of this tool does not look encouraging.

In fact, the "Tenth Report on the dissemination of alternative justice in Italy", published by ISDACI, shows that in 2016 (last available year) there was a reduction in the demand institutional arbitration, namely from 784 in 2015 to 708 in 2016.

From the examination of the data reported by the Report of the Ministry of Justice on the administration of justice for the year 2018,[23] it emerges that the number of cases registered with Italian Tribunals and Courts in 2018 stands at 3.215.989, and the number of cases pending before Italian tribunals as of 12/31/2018 that concern business proceedings, including matters pertaining to contracts and obligations and industrial and company law, stands at 342.434.

If we consider these later cases to be "arbitrable cases", the disproportionate number of judiciary disputes when compared to arbitrations becomes evident.

A new boost to arbitration may come from Law No. 247 of December 31, 2012, whose Article 1, para. 3 and Article 29, para. 1, point n), regarding provisions related to "New regulations of the legal profession", has attributed to the Council of Bars and Law the possibility to form arbitration and conciliation chambers, as well as bodies for alternative dispute resolution, in accordance with the conditions later stipulated in Decree No. 34 of February 14, 2017 by the Ministry of Justice.

Right now, however, there are no statistics regarding such Arbitral Chambers.

[23] https://www.giustizia.it/resources/cms/documents/anno_giudiziario_2019_relazione_sintesi.

3 Civil and Commercial mediation

Community directive 2008/52/CE provides the main rules in matters of mediation for the member states of the European Union.

Article 1 of the Directive specifies the objective that European legislators have fixed, which is to "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".[24]

Recitals 5 and 6 of this directive are particularly significant as they specify the need not only for a main instrument to "secur[e] better access to justice",[25] but also to "contribute to the proper functioning of the internal market".

This directive was integrated at the national level by Legislative Decree No. 28/2010,[26] in accordance with Article 60 of Law No. 69/2009.

Italian law, in addition to the objectives indicated by European legislators, seems designed to ensure the deflation of civil ligations.

Article 1 of Legislative Decree No. 28/2010, as modified by Law No. 98/2013[27] that has converted, through its modifications, Decree law No. 69/2013 (so-called "Decreto del Fare"), defines mediation as "the activity, however denominated, performed by an impartial third party and designated to assist two or more subjects in the search for an amicable settlement of a dispute, even through the formulation of a proposal that might resolve said dispute".

Legislative Decree No. 28/2010 foresees three types of mediations.

Article 2 governs optional mediations, that is, those mediations whose parties can resort to freely, as long as the matter relates to available rights.[28]

[24] Directive 2008/52/EC of the European Parliament and Council of 21 May 2008, on certain aspects of mediation concerning civil and commercial matters. https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32008L0052&from=EL

[25] Recital 5 of Directive 2008/52/EC: "The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services". Recital 6: "Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements".

[26] Legislative decree no. 28 of 4 March 2010 on the implementation of Article 50, Law No. 69 of 18 June 2009, on mediation whose purpose is the settlement of civil and commercial disputes.

[27] Law No. 98 of 9 August 2013, converting with modifications, of Decree-law No. 9 of 21 June 2013. Urgent provisions for the revitalization of the economy.

[28] Article 2 of Legislative Decree No. 28/2010, "Anyone can access mediation for the settlement of a civil or commercial dispute pertaining to available rights, in accordance with the provisions of this decree".

Article 5, para. 1-bis,[29] governs obligatory *ante causam* mediations, according to which, in cases of specific disputes indicated by the law, the mediation effort must necessarily be completed, under penalty of inadmissibility to other judicial proceeding.

Article 5, para. 2, governs judicial or requested mediation which occurs when the judge himself decides that the parties must use a mediation process. The judge's decision may be issued at any moment during the process, provided that it happens before the hearing for rebuttals and conclusions and, if no such hearing is foreseen, before the case itself is heard.[30] Even in this case, following the judge's decision, the mediation constitutes a condition of admissibility.

There exists, finally, another mediation model, the so-called mutually agreed mediation, presented in Article 5, para. 5 of Legislative Decree No. 28/2010, which the doctrine describes as a hybrid figure, that includes both optional and obligatory mediation. The parties, in this case, may agree or not to rely on mediation before addressing the courts or begin an arbitration.[31]

The provision on the obligatory *ante causam* mediation that considers the mediation attempt as a condition of admissibility to judicial proceedings per Article 5, para. 1 of Legislative Decree No. 28/2010 was strongly opposed by Italian lawyers, who achieved an important result at the end of 2012[32] when the Constitutional Court declared illegal laws on obligatory mediations because of a technical defect. This technical defect was the absence, in the ordinary law that had delegated the Government to issue Legislative Decree 28/2010, of a specific provision that authorizes the introduction of compulsoriness.[33]

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[29] Article 5, para 1-bis, Legislative Decree 28/2010 – Conditions for prosecution and relationship with the procedure – Anyone who intends to bring forth a claim on disputes concerning condominiums, property rights, partition, succession arrangements, family arrangements, leases, loans, business leases, compensation of damages resulting from medical and health liabilities and from defamation through the press or other means of publication, insurance, banking and financial contracts, is obligated, through the assistance of his lawyer, to preliminarily resort to mediation pursuant to this decree.

[30] Article 5, para. 2 of Legislative Decree 28/2010: "[...] the judge, even in an appeals court, once the nature of the claim, the instructions and the behavior of the parties were evaluated, may implement the mediation procedure; in this case, the implementation of the mediation procedure is a prerequisite for admission to the judicial request even at the appeals stage. The provision referred to in the previous point is adopted before the hearing for the statement of conclusion, or if no such hearing is foreseen, before the case is heard".

[31] Article 5, para. 5 of Legislative Decree 28/2010: "if the contract, the statute or the certificate of incorporation of the entity include a mediation or conciliation clause and the attempt is not exhausted, the judge or the arbitrator, with some exceptions, proposed in the first defense, assigns to the parties a deadline of fifteen days to present a request for mediation or sets the next hearing after the end of the term referred to in Article 6. In the same way, the judge or the arbitrator set the next hearing when mediation or the conciliation attempt have been started, but not concluded".

[32] Constitutional Court, decision No. 272 of 24 October – 6 December 2012, published in G.U. o 12 December 2012, on Cortecostituzionale.it.

[33] EU Directive 2008/52/CE Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system (Article 5, para. 2).

The technical defect was overcome in 2013, when mediation compulsoriness was re-introduced through an ordinary law (Law No. 98 of August 9, 2013, converting Legislative Decree No. 69 of June 21, 2013) that took the opportunity to intervene on other critical aspects of the original regulation, highlighted also at the European level.[34]

Nevertheless, taking into account the cost-related problems of mediation, in particular the costs of obligatory mediations, onto which were aimed the vast majority of the censures of the European Commission, the intervention made many unhappy. In fact, on the one hand, a provision for a first free meeting before a mediator was introduced, for illustrative, explorative and programming purposes (Article 8, para. 1), whose negative result would still allow the parties to fulfil the condition of admissibility (Article 5, para. 2-bis); on the other hand, during this first meeting, just as in any subsequent meetings, the parties must compulsorily be assisted by their respective lawyers (Article 8, para. 1).

This later provision was not coherent with the aim to limit costs as pursued by European law, nor was it coherent with the inherently informal nature of the mediation process.

If an amicable agreement is reached, it shall be enforceable. In fact, the updated Article 12 of Legislative Decree 28/2010 (as modified by the 2013 reforms), provides that:

> where all the parties involved in the mediation are assisted by a lawyer, the agreement that is signed by the parties and by the lawyers shall be enforceable for forced expropriations, execution of surrender and release, execution of the obligations to do and not to do, as well as for the registration of a judicial mortgage. The lawyers attest and certify the agreement's compliance with regulations in force and public order.

It is appropriate to highlight the fact that the provisions for the compulsoriness of mediation, in the cases described above, place the Italian system on plane that is very different from the European one. In fact, the Italian legislators' need to reduce civil disputes has pushed Italian legislators to adopt the mechanisms of the compulsoriness of mediation as condition of admissibility, mitigating this requirement through the mechanism of a free first meeting before the mediator. This first meeting has an illustrative, explorative and programming purpose for the mediation procedure,[35] whose negative result allows in any case to consider

[34] It is important to highlight on this point the opinion of the European Commission dated 2 April 2012 in decision C-492/11 for a request for a preliminary ruling requested by the *Giudice di pace di Mercato San Severino* dated 21 September 2011 (the preliminary ruling can be read in *Giur. it.*, 2012, 661).

[35] Article 8, para I, Legislative Decree 28/2010. "During the first meeting, the mediator specifies to the parties the function and procedures for the performance of the mediation. The mediator, again during this

fulfilled the condition of admissibility foreseen by Article 5, para. 2-bis of Legislative Decree 28/2010.

This system has allowed mediation to achieve significantly larger numbers in Italy compared to any other European country where an analogous mechanism is not present; this also to the detriment of the effectiveness of the aim to settle disputes out of court.

Another aspect that distinguishes mediation in Italy is the fact that the presence of lawyers is compulsory, both in the first meeting and during any subsequent meetings.[36] A provision, this latter, not coherent with European regulation and with the aim foreseen by this latter to ensure the informal nature inherent to tools of alternative dispute resolutions.

4 Assisted negotiation

The ADR system in Italy is further enriched following the entry into force of Legislative Decree No. 132 of September 12, 2014, afterwards converted into Law No. 162 of November 10, 2014 regarding "Emergency de-juridicalization measures and other interventions for the resolution of backlog in matters of civil procedures" that introduced a new institute for "assisted negotiation by one or more lawyers" designed to reach settlement agreements for civil disputes regarding available rights or labor.[37]

This tool, inspired by the French method of *procédure participative*, gives lawyers a central role, attributing them the role of agreement facilitator between litigants.

Unlike mediation, where the presence of a third impartial party is required, in assisted negotiations the lawyers themselves assist the parties through direct negotiations, which in the majority of the cases ends up being a negotiation that is not so much as assisted, as directly managed by the lawyers themselves.

Central to the procedure is the negotiation agreement,[38] or the agreement (to be concluded in writing under penalty of nullity) through which the parties agree to cooperate in good faith to resolve amicably their dispute through the assistance of the lawyers.

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first meeting, invites the parties and their lawyers to given their opinion on the beginning of the mediation procedure, and if this opinion is positive, to proceed with its implementation".

36 Article 8, para I, Legislative Decree 28/2010. "During the first meeting and any subsequent meeting, until the termination of the procedure, the parties must be assisted by a lawyer".

37 Article 2, para II, letter 2, Legislative Decree no. 132 of 2 September 2014, "the object of the dispute, which should not concern unavailable rights or relate to matters of labor".

38 Article 2 of Legislative Decree No. 132 of 2 September 2014, "Agreement to assisted negotiation (by one or more lawyers) is an agreement through which the parties agree to cooperate in good faith and faithfully to settle amicably their dispute through the assistance of registered lawyers pursuant to Article 6 of Legislative Decree no. 96 of 2 February 2001".

This Italian institution has more formal characteristics than the French one which, if they are pear in some way justified when taking into consideration the decision of the legislator to make the concluded agreement enforceable and recording of a judicial mortgage,[39] in fact, the regulation foresees that one party send to the other a formal invite to stipulate the negotiation agreement, while noting that a lack of response to the invitation or its refuse within thirty days may later be evaluated by the judge for the purposes of determining the expenses of the litigations, in addition to any other detrimental consequences towards the other party itself.[40]

Italian law has foreseen obligatory assisted negotiation for disputes regarding compensation for damages resulting from the circulation of vehicles and boats, and for disputes concerning the payment of sums not exceeding € 50,000.00, considering the completion of this negotiation, as is the case with mandatory mediations, as a condition of admissibility to be able proceed with a judicial request.[41]

Next to the mandatory assisted negotiation, Legislative Decree 132/2014 has foreseen an optional of assisted negotiation for family matters[42] through which spouses can achieve, with the help of lawyers, a consensual solution to legal separation, divorce, and the modification of conditions for separation or divorce.

The law foresees two distinct procedures depending on the presence or not of underage children, protected adult children or handicapped children.

If underage or handicapped children are present, the agreement concluded following an assisted negotiation agreement will be transmitted to the Public Prosecutor of the competent jurisdiction who, if no irregularities are perceived, will communicate to the lawyers its clearance so that what is foreseen by the regulations can be performed.

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[39] Article 5, para. 1, Legislative Decree No. 132 of 2 September 2014: "The agreement that settles the dispute, signed by the parties and the lawyers that assist them, is enforceable for the signing of a judgment lien".

[40] Article 4 of Legislative Decree No. 132 of 2 September 2014: "The invitation to stipulate an agreement must indicate the object of the dispute and contain the notice that a lack of response to the invitation within thirty days from its reception or its refusal may be used by the judge to determine the expense of the litigation and to what is foreseen by Articles 96 and 642, first paragraph, of the Code of Civil Procedure".

[41] Article 3 of Legislative Decree No. 132 of 2 September 2014: "Anyone who intends to bring forth a claim on matters concerning compensation for damage from circulation of vehicles and boats must, through his lawyer, invite the other party to enter into an assisted negotiation agreement. In the same way must proceed, with the exception of cases foreseen by the previous article and article 5, para. 1-bis, of Legislative Decree No. 28 of 4 March 2010, anyone wishing to bring forth a claim for the payment of a sum that is lower than fifty thousand euros. The implementation of the assisted negotiation procedure is a prerequisite to judicial request".

[42] Article 6 of Legislative Decree No. 132 of 2 September 2014: "The agreement to a negotiation assisted by at least a lawyer can be agreed upon by spouses that want to reach a consensual solution to their legal separation, to the cessation of all civil effects of their marriage, to the dissolution of marriage in the cases referred to in Article 3, para. 1, point 2, letter b) of Law No. 898 of 1 December 1970, and its further modifications, on the modification of conditions for separation and divorce".

Conversely, in the presence of underage children or protected or seriously handicapped adult children, that is children who are economically not self-sufficient, the activity of the Public Prosecutor is not limited to a formal verification of the agreement, but he will in fact intervene to evaluate if the agreement concluded following an assisted negotiation agreement responds to the interests of the children. The legislator foresees that the concluded agreement, following an assisted negotiation agreement, must be transmitted within ten days to the Public Prosecutor at the competent tribunal who, if he deems that the agreement responds to the interests of the children, will authorize it. If he deems that the agreement does not respond to the interests of the children, the Public Prosecutor will transmit it, within five days, to the President of the Court who will fix, within the next thirty days, the appearance of the parties before him, thus intervening on behalf of the children.

Article 6, para. 3 of the decree cited above, foresees that the agreement concluded following an assisted negotiation agreement produces the same effects and takes into account the judicial provisions that define the procedures of legal separation, cessation of the civil effects of marriage, dissolution of marriage and modification of the conditions of separation.

This regulation imposes to the lawyer of the party the obligation to transmit, within ten days, to the Officer of the Civil Register of the Community where the marriage was registered and transcribed, a copy, authenticated by himself, of the agreement, sanctioning him in case of violation of this obligation, with an administrative fine between 2.000 and 10.000 euros.

5 Procedures for the settlement of over-indebtedness crisis

The economic crisis that touched the European Union in the past few years, and in particular, Italy, has resulted in an increase of the average debt taken on by companies and individuals who, faced with insufficient earnings, found themselves unable to confront the debt incurred.

To face this general situation of crisis Italian legislators adopted Law 3/2012,[43] afterward integrated to Legislative Decree No. 179/2012 with further modifications, which introduces in our regulations the so-called procedures for the settlement of over-indebtedness crisis, designed to contain the debt burden of entrepreneurs and consumers.

[43] Law No. 3 of 27 January 2012 – Provision on matters of usury and extortion, as well as settlement of over-indebtedness crisis.

The legislator's intention with these procedures was to also include them in the framework of instruments aimed at reducing civil litigation procedures deriving from the forced recovery of contracted credits.

The purposes of the law are specified in Article 6 of the cited law, where the legislator, in paragraph 2, defines over-indebtedness as a "situation of continuing imbalance between the undertaken obligations and the assets that can be readily liquidated to meet them, which determines the relevant difficulty in complying with his obligations or the definitive inability to comply with them regularly". Paragraph 1 of this same article, which describes the purpose of the law,[44] also indicates the subjects that can access such procedures which are those subjects not eligible for alternative bankruptcy proceedings. The regulation find these subjects among entrepreneurs "not eligible for bankruptcy" (entrepreneurs not having access to the limitations referred to Article 1, Royal Decree No. 267/1942 (so-called, bankruptcy law),[45] agricultural entrepreneurs that have ceased their activity for more than one year, innovative start-ups,[46] professionals and professional organizations, and consumers who, as traditionally understood by Article 6, point b) of Law 3/2012 are natural persons that have taken on debt for purposes that are not related to any entrepreneurial or professional activity they might have undertaken.

Another requirement foreseen by the law for accessing the procedures for the settlement of over-indebtedness crisis is the requirement that the debtor has not used such procedures in the previous five years, has not been subject to the revocations, termination or cancellation of agreements approved pursuant to Articles 14 and 14-bis of the law in question, and has supplied all the information necessary to allows the full reconstruction of its assets/liabilities and financial situation.

The debtor, who complies with the requirements indicated above, can resort to one of three procedures for the settlement of over-indebtedness crisis as foreseen by the law in question, which proposes to creditors alternative solutions for the settlement of his debts.

The procedures in question are the following: 1) Consumer plan; 2) agreement for debtors who are not eligible for bankruptcy; 3) liquidation of the debtor's assets.

[44] Law 3/2012, Article 6, para "In order to settle situations of over-indebtedness for subjects that are not able to use other insolvency procedures, the debtor is allowed to come to an agreement with his creditors within the scope of the settlement of the crisis as governed by this chapter".

[45] Royal Decree No. 267 of 16 March 1942, Article 1, which establish certain limits on the assets, liabilities and revenues that can be subject to bankruptcy arrangements and agreements between creditors.

[46] Law No. 221/2012. Article 25, para. 1 defines the concept. "Innovative start-up" designates a limited company, including cooperatives, which has the sole or prevalent company object the development, production or promotion of innovative and high-tech products and services. This company may be under Italian law or a European company resident for tax purposes in Italy.

The consumer plan may be presented only to private consumers and on this point, Article 6, para. 2, point b) of Law No. 3/2012 indicates that "consumer" designates a natural person that has undertaken debt for purposes that are not related to any entrepreneurial or professional activity undertaken.

This plan consists in a proposal made to the debtor for the payment by installments of his debts. This proposal can also foresee the assigning of a part of the assets and a withdrawal from overall debt exposure.

This plan is approved and executed by a Judge through the approval of an autonomous decision. This decision is made regardless of the consent of the creditors of the over-indebted consumer.

The Judge, in fact, once he has excluded that the consumer has undertaken obligations without the reasonable expectation of being able to meet them, or that has negligently entered into over-indebtedness, approves the plan, providing an appropriate form of advertising for the relevant provision.

The agreement for the restructuring of the debt, instead, may be presented only by entities or companies that are not eligible for bankruptcy and has characteristics that are substantially similar to those of the consumer plan.

The only big difference is constituted by the fact that in this case, the Judge will not be the only one deciding, but all creditors will participate as well. In fact, the agreement must be accepted by a number of creditors that represent more than 60% of all the debt incurred by the subject. These creditors will express their consent through the exercise of their right to vote.

With the liquidation of the assets, in the end, the debtor (private consumer or subject not eligible for bankruptcy) makes available his whole assets to comply with the payment of his debts.

The Court in this case with proceed to nominate a liquidator who will take care of selling all the assets of the debtor and paying, pro-quota, all his debts.

From the liquidation of all the assets will be excluded: a) assets exempted from seizure and attachments per Article 545 of the Civil Procedure Code; b) maintenance claims, stipends, pensions, salaries and all what the debtors gains through his activities, within the limits of what is needed for his maintenance and that of his family as indicated by the judge; income derived from the legal usufruct of the children's assets, all assets constituting a trust fund, with exception of what is included in Article 170 of the Civil Code; d) as well as any other asset that cannot be seized under current law.

Omitting voluntary the procedural aspects in the strictest sense, it is important to highlight that Italian legislators through these procedures have in fact recognized for small entrepreneurs, professionals and consumers the right to a fresh start, or to start again free of the debts undertaken previously.

Furthermore, all procedures for the settlement of over-indebtedness crisis, managed and concluded in accordance with the law, allow the debtor so-called "bankruptcy discharge" from all residual debts towards insolvent creditors. In other words, the debtor may pay back creditors through what he is able to pay in his current economic situation. Finally, another advantageous effect of such procedures for debtors is the suspension of enforcement proceedings (seizures, court sales and actions, etc.) at his detriment, defer payment of VAT, obtain withdrawal from unsecured debts. If it is impossible to obtain a better result from the liquidation of the assets, even the so-called privileged credits will be substantially reduced.

6 From A.D.R. to O.D.R.

In its broadest sense, the concept of Online Dispute Resolution constitutes a model of dispute resolution pursued through IT tools.

The ODR, as generally referred to above, essentially constitutes in the transposition of any dispute resolution tool onto an online platform; therefore, such an instrument seems generally applicable to any type of dispute resolution.

The so-called ODR, in reality, does not imply simply the application of digital tools to ADR, but rather constitutes a number of distinct forms of online dispute resolution arising out of virtual transaction and exchanges and embedded with their own technical and international specifications that ordinary civil justice is not able to confront.

The need for online dispute resolution mechanisms has gained so much importance in the past few years that even the United Nations have recognized the need to promote such tools for the resolution of disputes arising from international commerce and e-commerce. For this purpose, in 2010, a work group was established within UNCITRAL (the United Nations Commission on International Trade Law) in order to individuate a tool for online dispute resolution, as well as specific procedural rules that will take into consideration the typology and tendentially low value of international contracts that are concluded in the framework of e-commerce .

The European Union has adopted a solution that takes into account both ODR typologies, but without ever moving too far from the harmonization required within the European single market.

In fact, by talking about A.D.R at the European level, we can without a doubt affirm that their privileged position and their development stems from the field of consumer protection in cross-border disputes and from the development of the internal market.

The first official communitarian act confronting the topic of A.D.R in Europe was the 1993 Green Paper on "the access of consumers to justice and the settlement of consumer disputes in the single market".

Through the Works of the Commission and the comparative studies done on the various solutions adopted by member states, it was brought to light that, in the majority of cases, individual States have adopted simplified judicial procedures for the resolution of small disputes and only certain countries have sought to identify out-of-court settlement tools for the resolution of disputes.

The successive Directive of 20 May 1997, on the protection of consumers with regards to long-distance contracts, highlighted the need for member states to adopt specific initiatives for the promotion of out-of-court settlement tools in consumer disputes, in order to facilitate the consumers' access to justice and the resolution of consumer disputes in the internal market.

The abovementioned Directive was followed by Recommendation n. 257 of 30 March 1998 , related to the general principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

The need to identify the principles and the guarantees adopted in out-of-court proceedings was born from the realization that ordinary courts are unsuitable to the resolution of consumer disputes; from here the need to resort to more flexible tools, such as mediation, conciliation and (for certain specific problems) arbitration.

These objectives, as indicated by the European Commission, can be pursued through the procedural provisions that guarantee the impartiality of the body responsible for dispute resolution, the efficiency of the procedure, its publicizing and its transparency, as well as the elimination of any imbalance between the financial costs of the procedures and the cost of an ordinary judicial solution.

Furthermore, the Commission noted the fact that out-of-court decisions should be adopted not only on the basis of legal provisions, but also on the basis of equity and the codes of conduct; that is on the condition that this settlement does not entail a diminution of the consumer's protection when compared to what would be ensured to the consumer if he had used a judicial instrument.

These principles constitute, to this day, a first nucleus of the legislations that the procedures and bodies that deal with the resolution of disputes must comply with.

Only a few years later, at the Lisbon Conference of 2000, the European Union highlighted the need to form a European Network for the solution of consumer conflicts, which was called the European Extra Judicial Network, with the acronym, EEJ-NET.

This project found its expression in European Council Resolution n. 155 of 25 May 2000 . In fact, this resolution outlined the essential elements of the Network to ensure that citizens of every member state had one unique point from where to get information surrounding the national systems for out-of-court settlement of cross-border disputes.

It was within the scope of this project that was passed Directive n. 31 of the European Parliament and of the Council of the European Union of 8 June 2000 (Directive on Electronic Commerce) which introduced for the first time, in Article 17, a specific reference to electronic tools for the resolution of disputes.

Successively, the Commission of the European Community no. 310 of 4 April 2001 adopted a new Green Paper in which A.D.R is represented as a political priority of the European Union, whose duty it is to promote such alternative methods, and to guarantee the best context for their development, as well as their overall quality.

This political priority was especially emphasized in the area of Information Society, since that's where the need for new services for the settlement of cross-border disputes through online dispute resolution (ODR) on the Internet was first recognized.

The course of action delineated above was the basis for the debate that led to the adoption of Directive n. 52 of 21 May 2008 , which laid down the rules for civil and commercial mediation in order to incentivize its diffusion across European states. In particular, Consideration 9 of this Directive remarks the utility of the ODR, which continues to be seen, however, as merely a sub-species of the ADR.

With time, various networks were created within the European Union with the scope of enabling consumer to bring cross-border disputes to an ADR entity established in another Member State, through the use of digital tools.

In terms of timing, the first such network created was the European Consumer Centres Network (ECC-Net). This network was launched in 2011, following the issuing of the directive on electronic commerce.

This network was made up of a European Consumer Centre for every Member State that functions as a contact point for the consumers of every acceding State. Every national ECC operates in close contact with the centres present in other member states, thus creating a network that aids consumers both in the management of contacts with a counterparty situated in another member state, as well as in the introduction and development of the dispute resolution procedure to ADR body.

The European Union has also supported the ECODIR project created by the University of Dublin and the Fin-net Network, although this was principally created for settling financial disputes.

We can certainly affirm that the ADR system, before and after the ODR, was strongly wanted by European intuitions who had seen in it a tool that would reinforce consumer trust in electronic commerce, guaranteeing the overcoming of any issues related to international private law regarding the choice of a competent jurisdiction for disputes arising from contracts stipulated through electronic commerce tool.

6.1 E.U. Regulation No. 524/2013 and the ODR platform

In 2013, the addition of the Directive No. 11/2013 of the European Parliament and European Council (Directive on ADR for Consumers) and E.U. Regulation 524/2013, pertaining to online consumer disputes, constitute a turning point for the development of the ODR discipline in Europe.

In fact, Regulation 524/2013 establishes a platform for the resolution of disputes that concern consumer contracts concluded for the purposes of electronic commerce that have for object the sale of goods or services.

It is important to note that this regulation in fact constitutes an update to articles 26 and 169 of the TFEU (Treaty on the Functioning of the European Union) as established in order to contribute and ensure a high level of consumer protection through the harmonisation of legislation across individual member states, as pursuant to Article 114 of the TFEU.

The objective of the platform seems coherent with Consideration no. 2 of the TFEU which reads:

> the internal market is to comprise an area without internal frontiers in which the free movement of goods and services is ensured. In order for consumers to have confidence in and benefit from the digital dimension of the internal market, it is necessary that they have access to simple, efficient, fast and low-cost ways of resolving disputes which arise from the sale of goods or the supply of services online.

This "digital prospective" constitutes the sphere of application of this regulation which is applied more narrowly than Directive 2013/11/EU.

In fact, the possibility to conduct a resolution through this platform is not open to all disputes between a business and a consumer, but only to disputes that arise between legal entities that are established in a Member State. The regulation, furthermore, can be applied only for all internal or international C2B (consumer to business) disputes, introduced by the consumer himself, in accordance with the directives on ADR, with the exception of those cases where the member State has foreseen, in the internal application of these provisions, to extend its sphere of application also to B2C disputes (business to consumers).

Through said platform it is possible to introduce a dispute that will be resolved using the ADR bodies that have been established and notified to the Commission on the basis of the directive. The platform for online dispute resolution (ODR) is nothing more than a single procedure through which the consumer and the traders of the European Union can settle their disputes, as long as they result from the purchase of goods and services effectuated online.

The European platform, financed by the Commission, has been active since January 2016 (available at the following link https.//ec.europa.eu/consumer/odr),

and is constituted by an interactive Website, freely accessible in all languages of the Union, that puts at the consumer's disposal an electronic form through which the consumers themselves can introduce their claim, which will then be forwarded to the counterparty and to the ADR body charged with the resolution of the dispute, and will transmit also everything that was filed by the applicant.

The platform puts at the consumer's disposal a number of delegated officers to maintain contact between the ADR body and the parties, and these officers will have the role of supplying information on the procedure that will be followed by the ADR body and to serve as an intermediary for the transmission of communications.

The ODR platform, furthermore, can also be effectuate an electronic translation of the documents necessary to the performance of the procedure.

The Regulation, in order to make current the use of the platform, has foreseen that, pursuant to Article 14, all "Traders established within the Union engaging in online sales or service contracts, and online marketplaces established within the Union, shall provide on their websites an electronic link to the ODR platform", so that all consumers that make purchases online are made aware of the existence of the platform through the website of the trader they are contracting with.

The development and the use of the "marketplace" has raised the problem of the subjection to such an obligation of individual sellers who sell their products through such instruments, in addition to the site that provides the marketplace platform.

This question is the subject of recent case law in German Courts.

On this point, recently the Dresden District Court issued a ruling (Oberlandesgericht Dresden, decision of 17 January 2017, ref. 14 U 1462/16), after a consumer association denounced the fact that a German company that used the Amazon platform to sell its products, had not informed in this marketplace its own clients of the possibly to access the ODR platform, nor was provided with the relevant link.

The Court, retaining that the obligation to insert the appropriate reference link falls only on individual sellers with their own e-commerce portals, rejected the claim.

As a consequence, according to this Court, only the provider of the sales platform (that is, Amazon in this case) has this obligation.

Only a week later, the District Court of Koblenz (Oberlandesgericht Koblenz, decision of 25 January 2017, ref. 9 W 426/16) adopted a decision that was diametrically opposed, affirming that all sellers that offer up their products for sale online using a marketplace platform (in the case in point, eBay) are subject, even in the marketplace, to the obligations set out in Article 14 of the Regulation.

To this day, the interpretation of this question has not been decided on by way of preliminary rulings by the Court of Justice in Luxembourg.

The issue of ODR has been until now confronted at the European level without taking into account the exponential development of e-commerce and marketplace platforms that operate at the international level and that are headquartered in Asian countries where a solution like that adopted at the European level can hardly be applied.

The trans-nationality of disputes that arise in the electronic market, coupled with the related difficulty of finding a national or conventional reference legislation to regulate disputes, imposes the need to find solutions to ongoing disputes that do not prescind from a specific law. In fact, in the context of these disputes the final aim is that of reaching a final agreement, regardless of the endeavors to liken its contents to national disciplines and/or judicial principles.

International transactions concluded through marketplace platforms and e-commerce are constituted by a contract concluded in a virtual environment that transcends every traditional location of the contracting parties in a dimensional and physical space, insofar as it makes one contracting party present to the other, even if the two are located in distant geographical areas. Furthermore, these procedures are characterized by the cancellation of any temporal gap in communication and payment. Such circumstances influence not only the legal framing of the stipulated legal transaction, but above all the possibility of attributing it back to a specific legal system. We might argue that transactions born online, like all disputes born online, reject a dispute resolution system that is external to the virtual environment.

In this context, we have seen ODR services that are offered by the same platform that bases its commercials success on the reliability of its transactions, or on a specialized website that has the requisite tools for the settlement of out-of-court disputes online, outside of the one that the platform itself manages, and with which the platform itself has established a partnership.

Through such tools, we are seeing a system that finds its essence in the amicable settlement of interests aimed exclusively at the settlement of a dispute and where, unlike national court proceedings, the assessment of rights and responsibilities is missing.

In other words, in conclusion, we are witnessing an abandonment of the law and national jurisdiction, not only in the investigative phase, but also in the executive phase, and we are also witnessing the establishment of a *ius mercatorum* that bases its own effectiveness in the reciprocal acceptance of conditions that have been established by traders.

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