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Chapter VII

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International and EU Perspective on Mediation: Mediation and Fundamental Right of Access to Justice

SUMMARY: Introduction. – 1. EU, Member States and ADR methods. – 2. The fundamental right of access to justice in Europe.

Introduction

Before approaching the main theme of the present chapter, it could be useful to introduce the legal basis and framework of the EU intervention in the field of mediation and protection of the right of access to justice, as well as the relevance of some provisions coming from the treaty law.

As it is undoubtedly well-known, European Union was originally created as an "Economic" Community for a purpose which was very different from the one that we know today. In fact, European treaties among France, Germany, Italy, Belgium, Netherland and Luxembourg, concluded during 1950s, were only devoted to an economic integration, i.e. to establishing among them of free circulation of the so-called *factors of production*. So, in that period, the single person was considered, by EU Law, only in his role of *factor of production*: the right of free movement and free circulation was not given to *each citizen* of a Member State, but to *each professional and employed worker*.

Today the situation is very different: EU Law is currently operating in very different directions, from the labels of the foods in the market, to the rights of flights' passenger; from the possibility to move from one country to another (and to stay in this latter country with one's own family) to the competition law among factories belonging to different European states. Even if the general situation is now more difficult due to the global economic crisis, and even if many EU citizens are beginning to have doubts about the real benefits proceeding by the participation to such a peculiar international organization, the integration is still continuing its way, and it's going deeper and deeper in the direction of the protection of human rights, like the right for a child not to be kept away from his parents or, in a very close future, the right to found a family with a partner notwithstanding the fact whether it is a traditional or a homosexual relation.

1. EU, Member States and ADR methods

It is now possible to establish the main link between EU Law and mediation: one of the rights that EU is trying to protect is represented by granting an *access to justice* as wide as possible. In that direction, the Union strongly wants to incentivize the use of alternative and extra-judicial procedures, which have to be directly created by Member States[1].

Regarding that specific topic, it has to be considered that today exists a pressing need for implementation of legal remedies other than the judicial one, since the number of legal proceedings before the courts is quickly growing year by year, and the same courts are not anymore able to decide – in an acceptable timeframe – on such an enormous number of complaints. This conclusion is valid both at domestic and at European level: even if the situation is not exactly the same all around EU, the Italian example is particularly significant: Italy is well-known in Europe for the duration of legal proceedings until the final and definitive judgement is pronounced, that can take 10 years, or even more, since the beginning of the proceedings[2]. An interesting example - in the field of private international law - of the situation in Italy is the pronunciation given in 2006 by the *Corte costituzionale*, which was obliged to rule on the unconstitutionality of Art. 18(1) of the Preliminary Rules to Civil Code, even if such provision had been repealed in 1995! The problem was that the proceeding was instructed *before* 1995 and was still pending in 2006, so the judge had to apply the rules that were in force when the proceeding started. Thus the Court had to spend work and time to state that a rule, already abrogated eleven years before, was not in compliance with the Constitution.

Such an example lets us understand how strong is today - not only but especially in countries that are in a situation similar to Italy - the demand for instruments of the dispute settlements alternative to the traditional procedure before the Court: they are the so-called ADR (*Alternative Dispute Resolution*) instruments.

A different and consequent problem is, then, to disseminate the knowledge of these instruments to citizens, convincing legal practitioners to use them. As it is well-known, one of the most grave difficulties in this regard is caused by the fact that, for a lawyer, the traditional judgment before a Court could be much more profitable. Therefore it is hard to force a lawyer to convince his/her client not to introduce a judicial complaint for the satisfaction of his/her right. At first Italy, for instance, solved the dilemma in a *tranchant* way, establishing that in a large part of civil and commercial matters mediation attempt was *mandatory* in order to obtain the possibility to access the Court.

So, why is the EU acting in the field of civil judicial cooperation?

Of course, domestic rules, both on mediation or on other ways of ADR, are not concerned with the European Law: if a dispute arises between two subjects habitually resident and domiciled in one country, regarding a contract they signed in this country and which individuates that same country as the place of performance for the obligations arisen by it, no problem occurs. The decisions on the possibility to apply an ADR method in such a case, on its compulsoriness for the parties and the effects that the agreement could produce, if concluded, are fully reserved to national legislation.

However, the situation is different if we consider the *cross-border disputes*: in the specific field of mediation, EU law states that a dispute has to be considered "cross-border" when «*at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party*»[3].

On the other side, it is quite obvious that a European intervention on the side of cross-border procedures represents a strong incentive, for national legislators, in the direction of reforming the same domestic law profiles: we have to consider that national legal systems are generally engaged to prevent a phenomenon that could appear as a consequence of European legislation. It's the case where, thanks to EU law guaranties, a country is forced to grant to a foreign European citizen better conditions (or a broader set of possibilities) than the ones recognized to its own citizens, since the EU Law is not applicable in "totally internal" situations (so-called *reverse discrimination*). In order to prevent cases

[1] We are going to explain in a while that this is the reason why European Institutions decided to approve a Directive - not a Regulation - on mediation: the first instrument leaves to Member States a certain margin for self-determination concerning the choices on the issues that are not covered by the same EU Directive.

[2] The definition "*Italian torpedo*" was created for this purpose in the field of intellectual property litigation.

[3] Directive 2008/52, Art. 2(1).

of *reverse discrimination* from occurring, EU Member States generally adequate their internal legislation to that one directly emanating from the Union regarding cross-border situations.

So, how is "civil judicial cooperation" linked to objectives of EU action? How did we arrive from an "Economic" European Community to the current Union, which approves provisions which are directly applicable in civil procedure?

The progressive growth of EU competences was inching but incessant in the second part of 20th century.

In principle, EU can only possess competences expressly given by Member States (principle of *conferral*), so until 1997 the Community was not allowed to approve any act in matters relating to civil judicial cooperation. In 1997 the Amsterdam Treaty was approved, and it entered into force in 1999. With Amsterdam Treaty, the 15 Member States decided that an intervention of the Community in the field of civil justice could be necessary to better realize the purposes of a common internal market and an effective freedom of movement of persons: in civil matters, (i) a unique judge has to be competent in European countries, (ii) a unique law has to be applied notwithstanding the state of the court, (iii) judicial decisions have to be recognized and enforced in all the states in the same way (so-called "*fifth European freedom*"), and (iv) access to justice has to be granted in the widest way possible. As an example, points (i) and (iii) are the reasons which lead to the approval of Regulation "Brussels I" (No. 44/2001); point (ii) is envisaged by Regulation "Rome I" (No. 593/2008); while point (iv) is at the origin of Directive No. 2008/52, i.e. the so-called "*Mediation Directive*".

We could also wonder why European institutions, which already operated in the field of civil justice through the Regulation instrument (e.g. Regulation "Brussels I" No. 44/2001, or Regulation "Rome I" No. 593/2008), have approved a "Directive" when regulating the matter of mediation.

The reason for such a choice has to be found in so-called *principle of subsidiarity*[4], that is a fundamental pillar for the European decision-making process. In particular, the principle determines when the EU is competent to legislate, and contributes to decisions being taken as closely as possible to the citizen. It is complementary to the abovementioned principle of conferral (and to the principle of *proportionality*).

Subsidiarity principle, aimed at determining the level of intervention that is the most appropriate in order to achieve EU goals, is particularly relevant in the areas of competences which are shared between the EU and the Member States: so it may concern actions at European, national or local level. In all cases, the EU can only intervene if it is able to act more effectively than Member States. The Protocol No. 2[5] lays down three criteria aimed at establishing the desirability of intervention at European level: EU legislation can replace domestic one if only

1) requested action has transnational aspects that cannot be resolved by Member States;
2) national action - or a lack of action - could be contrary to the requirements of the Treaties;
3) the intervention at European level presents clear advantages.

The principle of subsidiarity is also aimed at bringing EU and its citizens closer to one another, by guaranteeing that the action is taken at local level where it appears to be necessary. However, the principle of subsidiarity does not mean that action must always be taken at the level that is the closest to the citizens.

Summing up, the Union can only act in a policy area if:

- its action falls within the competences conferred upon the EU by the Treaties (principle of conferral);
- in the context of competences shared by the EU with Member States, the European level is the most relevant in order to meet the objectives set by the Treaties (principle of subsidiarity);
- contents and forms of EU action do not exceed what is necessary to achieve the goals set by the Treaties (principle of proportionality).

Coming back to the choice of the instrument for the European intervention between Regulations and Directives, we must consider that a Regulation is directly applicable and completely binding within Member States, while a Directive is only binding for Member States[6]; the first one is the instrument aimed at the *unification* of the law among Member States (i.e. same provisions everywhere within the

[4] EU Treaty, Art. 5.
[5] *Protocol (No. 2) on the Application of the Principles of Subsidiarity and Proportionality* attached to EU Treaties.
[6] Not towards citizens, except for some particular cases.

EU), while the second one is the instrument aimed at its *harmonization* (different rules, but a unique goal to achieve). So, once more, the subsidiarity principle plays an important role in the decision for the instrument to be approved. The *modus operandi* is always the same: if the standardisation of the rules is not necessary, and if it is possible to leave a certain margin for the freedom of the Member States in deciding how the purposes set by the Union have to be accomplished… well, in this case a Directive is the more appropriate instrument (hoping that Member States do not delay its implementation at domestic level, like unfortunately it sometimes happens, for instance, in Italy). If, and only if, it is necessary to grant a unique legal framework in all the Member States, then in such a case the approval of a Regulation can be justified.

Concerning mediation, European Council and Parliament considered that some space of intervention could be left to national initiative: Directive 2008/52 only contains some principles that each State has to include in its own national rules on cross-border mediation, and the final limit for the implementation of these principles at national level, fixed on 21 May 2011[7].

2. The fundamental right of access to justice in Europe

The possibility of enforcing a right is central to making fundamental rights a reality. *Access to justice* is not just a right in itself but also an enabling and empowering right in so far as it allows individuals to enforce their rights and obtain redress. In this sense, it transforms fundamental rights from theory into practice. Research and evidence-based advice on access to justice, therefore, also support making other rights effective[8].

The term "access to justice" is not commonly used as legal terminology and is not expressly used in, for example, the European Convention on Human Rights (ECHR)[9]. Instead, the ECHR contains provisions on fair trial and the right to a remedy (Articles 6 and 13). Similarly, the Universal Declaration on Human Rights (UDHR) states that «everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law»[10]. The International Covenant on Civil and Political Rights (ICCPR) equally refers to an "effective remedy" (Art. 2(3a)) for all the rights in the convention and further guarantees the right to "take proceedings before a court" (Article 9(4)), the right to a "fair and public hearing" (Article 14(1)), and the right to be tried without undue delay (Article 14(3c))[11].

However, with the Treaty of Lisbon, a specific reference to access to justice was introduced: the Treaty on the Functioning of the European Union (TFEU), Article 67(4) stipulates that «the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters»[12]. The Charter of Fundamental Rights of the European Union (CFR) which, according to the reforms introduced by the Lisbon Treaty, has the same legally binding status as the Treaties[13], provides for the «right to an effective remedy and to a fair trial» (Article 47 CFR)[14]. The third paragraph of that Article specifically refers to access to justice in the context of legal

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[7] A deep analysis of the Directive's content could be found in the contribution prepared by L. CARPANETO within the present *Volume* (Chapter VIII).

[8] See Report *Access to justice in Europe: an overview of challenges and opportunities*, Luxembourg, 2011, p. 3, commissioned by the European Union Agency for Fundamental Rights (FRA) and freely available at http://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf.

[9] The concept received explicit attention in the legal doctrine in the 1970's - 1980's: M. CAPPELLETTI, (ed.), *Access to Justice*, Milano, 1978, and, more recently, F. FRANCIONI (ed.), *Access to Justice as a Human Right*, Oxford, 2007.

[10] UN General Assembly, Universal declaration of human rights, Resolution 217 A(III), UN Document A/810 at 71 (1948), Article 8.

[11] The UN HRC (UN Human Rights Committee) has upheld the view that denial of access to justice is a sufficiently egregious breach of human rights that it may give rise to the right to have a criminal conviction reconsidered if the right to submit an appeal has been violated.

[12] Article 81(2)(e) refers to access to justice and Article 81(2)(f) to the «elimination of obstacles to the proper functioning of civil proceedings».

[13] See Treaty on European Union, Art. 6.

[14] The status of CFR is provided in Article 6(1) TEU. See the *Explanations relating to the Charter of Fundamental Rights of the European Union*, OJ C 303/17 of 14 December 2007, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

aid, but the Article as a whole summarises all the particular rights enshrined in the concept of 'access to justice'[15]:

a) right to an effective remedy before a tribunal;
b) right to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law;
c) right to be advised, defended and represented; and
d) right to legal aid for those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

At the international level the UN HRC, since its establishment under the ICCPR, has lead the way among the UN treaty bodies on interpreting concepts related to access to justice.

According to current usage, then, access to justice is related to a number of terms that at times are used interchangeably or to cover particular elements, such as access to court, effective remedies or fair trial[16]:

Source: FRA, 2010

In Europe, the right to access to justice was developed by the ECtHR in the context of Article 6 ECHR, which only applies to "civil rights and criminal charges". Although ECtHR jurisprudence has, over the years, continuously enlarged the scope of the notion of 'civil rights', so that nowadays also considerable parts of administrative law are covered by the safeguards of this provision, it is nonetheless a notable step forward that Article 47 CFR has abandoned this restriction, deliberately granting access to justice to all sorts of rights and freedoms guaranteed by the law of the Union[17].

According to long established case law of the CJEU, access to justice is one of the constitutive elements of a Union based on the rule of law. This is guaranteed in the Treaties through establishing a complete system of legal remedies and procedures designed to permit the CJEU to review the legality of measures adopted by the institutions. The right to effective judicial protection has been accepted by the CJEU as a general principle of Union law, as influenced by the case law of the ECtHR[18]. The CJEU has consistently used the constitutional traditions common to the Member States and Articles 6 and 13 ECHR as the basis for the right to obtain an effective remedy before a competent court[19].

In other words, access to justice must be much more than a mere formal possibility, it must also be feasible in practical terms.

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[15] CFR, Chapter VI, Justice, Article 47, *Right to an effective remedy and a fair trial*: «Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice».

[16] From Report *Access to justice in Europe: an overview of challenges and opportunities*, cit., p. 15.

[17] Explanations relating to the EU Charter of Fundamental Rights can be found in OJ C 303/17 of 14 December 2007, p. 30, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:EN:PDF.

[18] The approach of the CJEU has generally been to follow the reasoning of the ECtHR with regard to the meaning of the right to a fair trial as a general principle of Union law. See for example CJEU, *Baustahlgewebe Gmbh*, C-185/95, 17 December 1998.

[19] Advocate General Ruiz-Jarabo Colomer has stated: "Access to justice is a fundamental pillar of western legal culture [...]. Therefore the right to effective legal protection is one of the general principles of Community law, in accordance with which access to justice is organised [...]. Access to justice entails not only the commencement of legal proceedings but also the requirement that the competent court must be seized of those proceedings" (Opinion of Advocate General Ruiz-Jarabo Colomer, CJEU, *Roda Golf & Beach Resort SL*, C-14/08, 5 March 2009, para. 29).

Within the EU legal order, there is no doubt on the fact that the right to effective legal protection equally covers access to the EU courts (here, the Court of Justice and the General Court), as well as access to national courts and tribunals for the enforcement of rights derived from EU law.

Conclusively, it has been suggested by the European Union Agency for Fundamental Rights that the adoption, at a national level, of some *good practices* could facilitate access to justice for complainants[20]. Among these practices, Member States should concentrate their intervention on:

1. simplified and less formalistic *procedural rules* (first of all, mediation);
2. *e-justice* initiatives;
3. the introduction of generous rules on *legal standing*[21];
4. the availability of *redress* other than compensation;
5. finally, "*pro bono*" *initiatives* (free-of-charge services provided by, for example, law firms).

High costs associated with legal proceedings, such as court and lawyers' fees, may deter individuals from pursuing remedies through the courts. Although legal aid is available in all Member States, rules surrounding the determination of eligibility for legal aid should be formulated in such a way as to ensure that those without sufficient financial means have access to adequate assistance. Accordingly, Member States should consider re-examining the thresholds set for 'means' testing, or the formulations applied in 'means and merits' testing in such a way as to guarantee access to justice for all. The introduction of alternative dispute settlement mechanisms, such as *quasi-judicial procedures* available before some of the equality bodies, may help to ensure access to justice by providing a faster and cheaper alternative to claimants: that's why a large possibility to access to high-quality mediation procedures should be strongly encouraged in all Member States in order to strengthen the use of ADR methods for the settlement of disputes.

[20] See Report *Access to justice in Europe: an overview of challenges and opportunities*, cit., p. 10.

[21] Narrow rules relating to legal standing prevent civil society organisations from taking a more direct role in litigation and, at the same time, prevent the possibility for consumers to begin so-called *"class" actions*. EU non-discrimination law (see, notably, Council Directive 2000/42/EC of 29 June 2000 - "Racial Equality Directive" - and Council Directive 200/78/EC of 27 November 2000 - "Framework Employment Directive") requires Member States to allow associations, such as non-governmental organisations (NGOs) or trade unions, to engage in judicial or administrative proceedings on behalf of or in support of claimants but, beyond this area of law, such entities are allowed to initiate legal proceedings in only some Member States. Most Member States allow for public interest actions (*actio popularis*), for instance, in relation to environmental cases (according to their obligations under the 1998 Aarhus Convention). This suggests that broader rules on legal standing are acceptable in principle, and Member States should consider widening their rules on standing in other areas of law.