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Federico Antich[1]

'All roads lead to Rome: How mediation became a turning point for Chinese trade in Italy'

Introduction

International trade is reeling from the shock of the Covid-19 pandemic. While it is hard to foresee the exact date when the world will (if ever) regain its pre-Covid condition, many business people are coping with the present restraints of our new normal.

Wise entrepreneurs are aware of the importance of active listening while doing business, especially during hard times. They are conscious that behind every danger hides an opportunity and this is particularly true in times of crisis.

If international trade is to prosper, international businesses need to proceed in an efficient and effective manner. Likewise, if states really want to retain market shares for their corporations and attract foreign investments they need to secure and maintain a friendly environment for business. They need to provide settings conducive to stable commercial relationships and predictable outcomes for stipulated agreements.

Speaking of trade, Italy has been an attractive venue in a variety of areas. This is not new as the country has been working hard in recent years to improve its attractiveness to foreign investors, as also witnessed by the World Bank Group's 2020 Doing Business indicators. Notably, Italy this year reached first place in its "Trading Across Borders" ranking. However, Italy is still struggling to climb the ladder, away from the lower mid-table position that currently sees her at 122nd place in the corresponding "Enforcing Contracts" indicator.

The reasons for these mixed results are generally a) the excessively slow pace of the Italian judiciary, whether at trial level or higher; b) the costs associated with litigation, in terms of court costs and legal fees, and c) the uncertainty inherent in most dispute-resolution systems that invite the losing party to appeal.

The Belt and Road initiative prefers mediation

In complex transnational business transactions country risk is a variable that is usually taken into account from the start. Carefully drafted contracts will call for arbitration venues as the preferred alternative to litigation in public courts. Of course, this can be criticised for not being a flawless option either and increasingly complex arbitrations can, in Tom Stipanovich's words, resemble that of a "new Litigation".

Mediation is, therefore, a more attractive way of handling business disputes. Its attraction lies in its voluntary nature, the reasonably short amount of time it requires and the confidentiality it provides.

That is most likely why mediation was selected from the start as a preferred method of dispute resolution in Euro-Asian trade under the Belt and Road (BnR) initiative. In particular, it might in this context also help preserve business relationships, which may be considered to be of value in and of

itself[1]. Although avoiding an overly simplistic answer is not an easy task. Nevertheless, to begin a description I provide an outlook on the Italian model of mediation and its legal landscape. This is followed by a statistical overview and a focused analysis of the significant role held that mediation played in Italy's c2B disputes. I end on a brief comment about the country's attitude towards the Singapore Convention, which, since the BnR initiative launched, is the most remarkable legal instrument affecting mediation in international trade.

The legal basis for Italian mediation[2]

On 20 March 2010 Italy took the big step towards enacting Legislative Decree 4 March 2010 n. 28. The decree was a legal instrument that would embrace mediation to reduce the judiciary's heavy workload and promote a sustainable approach to civil and commercial dispute resolution. Italy was thus the first EU state to adopt the union's Directive 52/2008. These legal provisions drew much attention from lawyers and largely considered mediation as mandatory and a condition in certain cases for accessing court litigation. Following a ruling of the Constitutional Court in December 2012 these mandatory mediation provisions were ruled unconstitutional. Thus in 2013, Law Decree 21st June 2013 n. 69 rebooted mediation by reformulating its purpose and scope. Parties to a dispute in one of the topics listed in the new Decree's Article 5 were now required to apply to participate in an information session with a professional mediator – a so-called "first meeting".

During a "first meeting" the mediator clarifies the mediation's role and modalities to the parties and invites the parties and their lawyers – whose presence is required by law – to decide if they want to participate in a mediation proceeding. If so, the mediator proceeds accordingly.

However, the degree of commitment required in the "first meeting" during the semi-mandatory stage mandated under the Mediation Law remains debatable. Based on the diversity of the judicial decisions on the matter so far, it is still unclear if the parties themselves must be personally present or if they can appoint a proxy. It is also unclear whether they are expected to engage in some kind of good-faith negotiation or if their presence is merely a formality. This issue is far from technical. Since this "first meeting" is the only mandatory part of the mediation process and involves tens of thousands of cases throughout the country annually, the judiciary's reactions to the parties' conduct and their counsels in these situations may well shape the future of mediation in Italy.

Another way to promote mediation among litigants which has been in effect since 2013 is court-ordered mediation. In this case trial judges have the power to issue an order to undertake mediation while the case is halted for a three-month period. Notably, the power granted to some judges to strike out a case should the parties not comply with this mediation order is still subject to great debate within the legal community. Although the impact of such measures on the judiciary's case load could be significant, at present only a few local courts have adopted this approach.

Italian mediators are required to hold a bachelor's degree in any subject or be a member of a professional association, complete a fifty-hour training course on theory and practice of mediation with a four-hour final test and commit to continuous education.

Although the Ministry of Justice is required to monitor the nationwide development of mediation proceedings, complete and accurate statistical data remain elusive after ten years on. A full picture of Italian mediation thus remains sketchy.

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1 See Julien Chaisse, Mitsuo Matsushita, China's 'Belt And Road' Initiative: Mapping the World Trade Normative and Strategic Implications, Journal of World Trade 52, no. 1 (2018) 172; Guiguo Wang, The Belt and Road Initiative in quest for a dispute resolution mechanism, Asia Pacific Law Review, Vol. 25, 2017, Issue 1. some sceptics have raised concerns over the implication of the government's attitude, Italy has enthusiastically embraced the business vision behind the BnR Initiative. But are Italian business and the country's legal landscape ready to welcome this new opportunity for growth? More to the point: is Italian mediation a mature dispute-resolution process?

2 The following section was prepared by the author in the capacity of an International Bar Association (IBA) country representative, with the active contribution of IBA Country Co-Representative M. Francesca Francese.

Statistics

Nevertheless, the following statistics from the Italian Ministry of Justice in 2019 are noteworthy:

- only about ten percent of ordinary litigation cases turn to mandatory mediation;
- where the summoned parties accepted an invitation to mediate, 46.3 percent of mediations reached an agreement in 2019;
- in the same year, the acceptance rate of invitations to mediate was 49.2 percent;
- the percentage of mediation cases to reach an agreement was thus 28.6;
- it is fair to assume that each agreement reached through mediation equals one less case filed in court;
- Because the recorded number of requests for mediation in 2016 was 147,691 we might assume that mediation procedures decrease the number of lawsuits in that year by some 42,000.

The second objective of the Law on Mediation – to promote a sustainable approach to dispute resolution in civil and commercial matters – in this light, appears to be quite far off. As shown by the available statistics, voluntary mediation accounts for a very small portion of the overall proceedings activated.

It should be noted, however, that Italy has a long tradition of using, either formally or informally, mediation, conciliation and third-party intervention to help disputants prevent or avoid conflict. The Chambers of Commerce have for decades been among the few promoters and providers of alternative dispute resolution tools. Both companies and citizens have benefited from conciliation services and several of the best trained and most esteemed Italian mediators today started their careers in courses provided by the Chambers of Commerce. Finally, thanks to mediation fruitful inroads have been made in disputes between individuals and public utility companies, like telecommunication, power and water providers.

The Singapore Convention

In closing, a word on Italy and the Singapore Convention. Italy has shown an interest in the works of the United Nations Commission on International Trade Law (UNCITRAL) Working Group II on dispute resolution, which produced the Singapore Mediation Convention. At its 51st session on 26 June 2018 UNCITRAL approved the final drafts of the Convention on the Enforcement of International Settlement Agreements. It also issued a corresponding revision of the 2002 Model Law on International Commercial Conciliation (now renamed Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018). This concluded three years of vigorous debate, conducted by 85 member states and 35 international governmental and non governmental organisations. The convention was opened for signatures by all states in Singapore in August 2019 and will enter into force on 12 September 2020.

It is still too early to foresee whether Italy will become a signatory to the convention, either directly or indirectly through the European Union. However, it may be expected that, given the convention's focus on the execution of the mediated settlement agreements, which is a now well-established subject in domestic mediation.

Some potential issues may arise when confronting internal rules on the value of mediated agreements and their possible enforcement outside of Italy. See for instance Article 6 of the EU Directive 2008/52/EC regarding certain aspects of mediation in civil and commercial matters regarding the "enforceability of agreements resulting from mediation". Notably, Article 6 of Directive 2008/52/EC resembles Article 5 of the Singapore Convention. For an early comment on this topic to continue the conversation, I can recommend Ming Liao's post 'Singapore Convention Series' on the Kluwer Mediation Blog from 12 April 2020.

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