Article

Corporate Mediation and Company Law

State of the Art, Recent Trends and New Opportunities

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1 The Italian Legal Framework on Corporate Mediation

In Italy, corporate mediation[1] was at first regulated by a special law, the Legislative Decree n. 5/2003, which complemented the general reform of company law introduced by Legislative Decree n. 6/2003.

The main goal of the company law reform was to make the Italian system more advanced and competitive, in a context of growing regulatory competition among jurisdictions, especially within the European Union (EU).

In this perspective, the provision of effective means for the enforcement of shareholders' rights was considered a necessary part of the strategy, on the assumption that the competitiveness of the system does not depend only on the substantive company law, but also on the procedures adopted to ensure legal certainty and rapidity in the resolution of disputes.

Focus on enforcement was a key element of the whole company law reform. Thus, Legislative Decree n. 5/2003 introduced a comprehensive and special system of dispute resolution for companies, based on special rules of civil procedure, to address corporate disputes in courts (the so-called *rito societario*) and, quite innovatively, on special ADR (Alternative Dispute Resolution) proceedings, namely, corporate mediation, corporate arbitration and resolution of disputes on management decisions of the shareholders or the management body (variously named as economic arbitration, economic-management arbitration or economic arbitrage; in Italian, *arbitraggio gestionale*).[2]

The role given to private autonomy in choosing the appropriate means of dispute resolution in corporate matters was consistent with the underlying philosophy of the general company law reform, which aimed at enhancing the flexibility and the role of private autonomy in shaping the internal organisation and governance structure of each company. In this perspective, the mediation clause (as well as the arbitration clause) has a clear organisational impact and is binding for all shareholders, directors and the company itself, as is any other clause in the by-laws.

Legislative Decree n. 5/2003 was abolished by several subsequent laws, and it is currently in force only for the part regarding corporate arbitration and *arbitraggio gestionale*. The special rules for civil procedure in corporate

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1. With the term 'corporate mediation', we refer here to the mediation of corporate disputes, which means, in a broad sense, any dispute where a corporation is involved, including those commercial disputes with business partners; in a strict sense, it means corporate governance disputes involving shareholders, directors and the company itself.

2. *See* Arts. 34-40, Legislative Decree n. 5/2003; comments on the special system of dispute resolution envisaged by the Legislative Decree can be found in: Costantino G. & Cabras G. (2009). Il processo commerciale e l'arbitrato societario. In F. D'Alessandro (Ed.), *Commentario romano al nuovo diritto delle società*. Piccin,Padova; Besso C., Canavese E., Carratta A., Corsini F., Dalmotto E., Frus G., Negrini L., Nela P.L., Ronco A. & Turroni D. (2004). *Il nuovo processo societario*, S. Chiarloni (Ed.). Zanichelli, Bologna; A.I.A., Conciliazione e arbitrato nelle controversie societarie (conference proceedings, Rome 7 November 2002), Roma 2003. On corporate mediation, *see also*: De Rita M. (April 2017). Mediation in Corporate Disputes in Italy, 89. *European Company Law Special Issue on Corporate Mediation*, 14(2); Astorina M.R. & Caradonna M. (Eds.). (2013). *La mediazione civile nelle liti tra soci: profili giuridici ed efficacia negoziale*, Quaderno n. 48, Commissione Metodi ADR, SAF (Scuola di Alta Formazione Luigi Martino). Milano.

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disputes were abolished by the civil justice reform bill of 2009 and the rules on corporate mediation were abolished by the Legislative Decree n. 28/2010,[3] which implemented the 2008 European Directive on mediation in civil and commercial matters (Directive 2008/52/EC). However, they were not completely abandoned, in that Legislative Decree n. 28/2010 adopted many of the solutions firstly provided only for corporate mediation, de facto extending the application of these principles and provisions to a broader range of disputes.

Currently, no specific provision is provided for corporate mediation, except for the provision on the effects of the mediation clause included in a company by-law (Art. 5 Legislative Decree n. 28/2010). Nevertheless, the application of mediation rules and procedures in corporate disputes may raise specific legal issues which need to be addressed according to current company law.

As to the effective use of mediation in corporate disputes, there are no clear and definite figures available and it is not easy to collect empirical data in a comprehensive way, due to the confidentiality, flexibility and diverse setting of the process.

The Ministry of Justice regularly publishes the trends of the annual registrations of civil and commercial mediation, specifying the number of cases only for matters where mediation is mandatory, but not in 'other matters'; therefore, there are no specific data available on corporate mediation. Looking at the trends for 2020, it emerges that mediation on 'other matters' (including corporate disputes), where mediation is voluntary, corresponds to only 16.6% of the total number.[4]

Also, the statistics published by the Milan Chamber of Commerce, a leading centre for arbitration and mediation, indicate that corporate mediation accounts for only 2% of the total number of mediation cases submitted in 2020.[5]

These figures suggest that there is still resistance among the parties in a dispute to engage in dialogue through mediation, not only where corporate disputes are concerned but also more generally. This is true, even though when parties decide to continue with the mediation attempt, the percentage of agreement reached to resolve the dispute is relevant. Even where no agreement is reached, or only a first meeting is held, there is (normally) an improvement in the relations between the parties and this can help to keep the business relationship alive.

3. Dalfino D. (2016). *Mediazione civile e commerciale*. Zanichelli, Bologna.
4. Ministero della giustizia – Statistiche. Retrieved from www.giustizia.it/giustizia/it/mg_1_14_1.page?contentId=SST327682&previsiousPage=mg_1_14.
5. MED – 2020 Report Annuale.pdf (camera-arbitrale.it). Retrieved from www.camera-arbitrale.it/upload/documenti/statistiche/MED-2020ReportAnnuale.pdf.

2 Corporate Mediation Clause and Related Company Law Issues

One way to expand the use of mediation would be to promote the introduction of mediation clauses in the articles of associations of companies.

Although it is always possible to start a mediation based on an ad hoc agreement reached once the dispute rises, a statutory mediation clause would be more effective to cover any potential or future conflict involving the company and its shareholders and to shape the procedure of mediation.

Moreover, mediation provisions in contracts put the dispute resolution framework in place at the relationship's beginning, not when a conflict arises. Parties can freely shape the content of the clause and decide on the mediation procedure to be followed by choosing where to carry out the mediation or by delegating the choice to a third party. The clause can determine the model of mediation, whether facilitative or evaluative, providing a more active role for a mediator, who can then formulate proposals.[6] Also, the clause can adopt a multistep approach in dispute resolution, where the attempt to mediate may be followed by arbitration.

Therefore, the introduction of a mediation clause gives providers of capital, directors, managers and other stakeholders a readily available mechanism for dealing with their disputes. Nevertheless, the provision of a mediation clause in the articles of association of a company is still infrequent.

The mediation clause has the same nature and effects as other rules in the by-laws governing the corporate relationship. Thus, as to the scope of application, the clause is binding for all shareholders, directors and the company itself, like any other clause in the articles of association, and covers any dispute arising out of or referring to the companies' internal affairs and relationships, unless differently provided by the clause itself, for example, by limiting the scope only to specific disputes.

Mediation must refer to disputes related to 'disposable' rights.[7] A right is considered 'disposable' when the holder has the faculty to establish, regulate or extinguish the right by contract. On the contrary, rights and obligations over which the parties cannot validly make legal disposition cannot be solved through mediation.

When it comes to company law, it is not always easy to distinguish when the disputed right is freely disposable by the parties and, in the absence of any precise legal definition, there are still different positions expressed among scholars and in court decisions. Here, the presence of a plurality of parties and the potential relevance of the interests of third parties, such as creditors or investors or the public in general, make the distinction more complex. Besides, corporate relationships and

6. Legislative Decree n.28/2010 allows both models of mediation (Art. 1).
7. Art. 2, Legislative Decree n.28/2010.

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shareholders' rights and obligations are defined through the rules organising the company in relation to carrying out a common activity and have effects on the organisation itself. In this context, disputes regarding the exclusion or the withdrawal of a shareholder, as well as disputes regarding the dissolution of a company or the sale or purchase of shares, or even liability action against directors, are normally considered to be suitable for mediation. Nevertheless, it is still highly debatable whether the challenge of shareholders' meetings, particularly those approving financial statements, can be satisfactorily resolved through mediation.

In practice, the disputes that are more commonly referred to mediation concern deadlock in the decision-making process, relationships between shareholders, liability of directors, dissolution of a company, exit of a shareholder and the consequent assessment of the value of this participation. Challenges of shareholders' meetings are less frequent. However, uncertainty about the definition of which disputes can be solved through mediation is a major obstacle to its effective use.

The introduction of a mediation clause in the articles of association is subject to the regime for amendments provided by general company law, which requires the approval of an extraordinary general meeting with a qualified majority requested for any other amendments of the articles of association.[8]

In this respect, there is a substantial difference compared with the rules for the introduction of an arbitration clause. According to Article 34 of Legislative Decree n. 5/2003, amendments to the articles of association, introducing or deleting arbitration clauses, must be approved by shareholders representing at least two-thirds of the share capital, and exit right is granted to absent or dissenting shareholders. The different regime is explained by the different effects of the mediation clause and the arbitration clause, since the former – differently from the latter – does not affect the possibility to refer the dispute to a court; according to the law, the commitment to attempt to find an amicable settlement of the disputes is considered just as a 'contractually' defined condition for the subsequent admissibility in court.[9]

Once an enabling provision is included in the articles of association, the mediation clause binds the parties to an obligation to collaborate to reach an amicable settlement when a dispute arises. This is an obligation of means, which cannot turn into an obligation to reach a settlement. In the absence of any preliminary attempt to mediate the dispute, the judge or the arbitrator can suspend the court proceedings, only upon a party's objection, and assign a deadline for the submission of a request for mediation;[10] the objection cannot be raised by the judge ex officio, as is the case for mandatory mediation.[11]

3 Recent Trends in Company Law and New Opportunities for Corporate Mediation

New trends in company law, at national and international levels, may create new opportunities for the use of mediation to solve corporate-related disputes and to prevent them.

The most recent developments in company law are mostly influenced by the emergence of sustainability issues strictly related to the impact of business activity on the environment and society as a whole, and more broadly on human rights.

The theme of sustainable development inclines towards a rethinking of the traditional setting of the legal system and of company law where the protection of the interests of external stakeholders is no longer entrusted only to public rules and sanctions but should also be a responsibility of the companies themselves.

This is the approach followed in the United Nations Guiding Principles on Business and Human Rights, adopted in 2011,[12] which are grounded in the recognition of the role of business enterprises – as specialised organs of society performing specialised functions – to comply with all applicable laws and to respect human rights, which complement the states' existing obligations to respect, protect and fulfil human rights and fundamental freedoms. On the same grounds, the OECD (Organisation for Economic Co-operation and Development) Guidelines for Multinational Enterprises[13] provide to multinational enterprises non-binding principles and standards for responsible business conduct in a global context.

In this framework, two trends emerge: on the one hand, companies voluntarily commit to develop a broader definition of the company 'purpose', even beyond the legislative provisions, and to practise strategies consistent with this purpose,[14] and on the other hand, the

8. Art. 2368 Civil Code.
9. Bevilacqua G. (2012). Le clausole di conciliazione negli statuti societari. *Rivista Ianus*, 6, p. 115; Costantino G. & Cabras G. (2009). Il processo commerciale e l'arbitrato societario. In *Commentario romano al nuovo diritto delle società*, cit., p. 409; Nascosi A. (2008). La conciliazione stragiudiziale societaria a quattro anni dalla sua introduzione. *Rivista Trimestrale di diritto e procedura civile*, 2, 585.
10. Art. 5, par. 5, Legislative Decree n. 28/2010.
11. According to the provision on mandatory mediation – for disputes concerning condominium, property rights, division of property, inheritance law, family agreements, loan, rent, compensation arising from medical liability – the attempt of mediation is a condition for the admissibility of the disputes in court and can be raised also by the judge or the arbitrator (Art. 5, par. 1, Legislative Decree n. 28/2010).
12. Retrieved from www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.
13. Retrieved from www.oecd.org/daf/inv/mne/48004323.pdf.
14. *See*, for instance, the Business Roundtable (an association of chief executive officers of America's leading companies) Statement on the Purpose of a Corporation, released in August 2019 and signed by 181 CEOs, who commit to lead their companies for the benefit of all stakeholders – customers, employees, suppliers, communities and shareholders. In the same direction, there is a trend in the evolution of corporate governance codes for companies. The new Italian Corporate Govern-

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debate on the sustainability of business activities suggests the need to modify company law rules to enlarge the scope of the duties of directors, who should act for the protection of interests of shareholders, as well as of other stakeholders.

Recent developments in France and the United Kingdom go in this direction. In France, following the increase in transparency regarding sustainability and social responsibility, in 2017 a specific duty to supervise their supply chain was imposed on large companies. More recently, the *Loi Pacte*, adopted in 2019, amended Article 1833 of the civil code, to establish that the company is managed in the company's interest, but also considering the social and environmental impact of its activity. It also introduced a new type of company, the *société à mission*, a special model of a lucrative company that also pursues the interests of other stakeholders by virtue of an express choice of the articles of association. In the United Kingdom, reform of the 2006 Companies Act implemented the principles of the so-called Enlightened Shareholder Value Theory, which aims to impose a broader consideration of interests in the management of the company, without prejudice to the primacy of creating value for shareholders. In this perspective, legislative intervention has focused on defining the fiduciary duties of the directors of corporations: Section 172 of the Companies Act requires them to pursue the interests of the company over the long term for the benefit of all shareholders, considering the interests of other stakeholders.

In Italy, the debate is still open.[15] Although there is no general rule that explicitly requires directors to consider interests other than those of the shareholders, company law already envisages some provisions to protect certain categories of stakeholders, such as creditors and workers; in addition, it allows for the extension of the category of interests that must be considered by the directors by using the spaces recognised for statutory autonomy. Moreover, in 2016, a new model of company, the 'benefit company', was introduced, which, just like the French *société à mission* (adopted three years later), also pursues the interests of other stakeholders by virtue of an express choice in the articles of association. Directors of a benefit company have therefore the duty to balance the interests of shareholders and the interest of the categories of stakeholders indicated in the articles of associations and to reconcile the lucrative purpose of the company with the purpose of common benefit.

At the EU level, the assessment of the possibility for reforming the fiduciary duties of directors is one of the main objectives of the Action Plan on Sustainable Finance of 2018.[16]

As regards these aspects – not yet subject to regulatory interventions – the European Commission intervened (i) with a roadmap of future regulatory interventions, in which a possible revision of the European Company Law Directive (2017/1132 / EU) and of the Shareholders' Rights Directive (2007/36 / EC, as recently amended by 2017/828 / EU) was expressly considered, and, more recently, (ii) with the public consultation, concluded in February 2021, specifically dedicated to the reform options for achieving 'sustainable corporate governance'. The proposal is aimed at expressing a duty of directors to pursue the interests of the company in the long term and, to this end, consider not only the interests of the shareholders but also those of a wider audience of stakeholders. In this respect, the Commission's proposals also aim to define the ways in which to consider the interests of the stakeholders, up to hypothesising a necessary balance with the interests of the shareholders. The document pays particular attention to the prospects for legislative intervention aimed at imposing an obligation of diligence on companies with respect to the potential environmental and social impacts of their supply chain. More recently, in March 2021, the European Parliament adopted a resolution with recommendations to the Commission on corporate due diligence and corporate accountability.[17]

Here again, focus should be on the adoption of adequate enforcement measures to support the concrete solutions envisaged at the level of company law. Enforcement of companies' responsibilities and, more specifically, of enlarged directors' duties, is a key issue which requires innovative solutions to effectively consider and give voice to external stakeholders.

One way to approach the issue could be to strengthen judicial enforcement by extending also to stakeholders the entitlement to act for liability against the company and its directors. This is a solution suggested in the European Commission Consultation on Sustainable Corporate Governance vis-à-vis the provision of duty of diligence requirements through the supply chain.

Relying only on judicial remedies would not necessarily be the best solution when different interests are at stake and there is a need to preserve business, while also preserving stakeholders' interests, and a win-win solution should be looked for.

ance Code, adopted in 2020, provides that "[t]he board of directors leads the company by pursuing its sustainable success" (Principle 1). Retrieved from www.borsaitaliana.it/comitato-corporate-governance/codice/2020eng.en.pdf.

15. For a business perspective, *see*: Assonime Report, Doveri degli amministratori e sostenibilità, 18 March 2021, Note e Studi n. 6/2021. Retrieved from www.assonime.it/attivita-editoriale/studi/Pagine/Note-e-Studi-6_2021.aspx.

16. At the EU level, an initial extension of the interests that the directors must consider and a possible extension of the scope of their fiduciary duties derive from the 2014 Directive on non-financial information. The disclosure obligations imposed about the management of environmental and social risks related to the company's activity entail the need for the directors to consider sustainability issues as a structural component of corporate strategies, in terms of both growth opportunities and risk management context. In 2017, the revision of the Shareholders' Rights Directive moved in the same direction. To strengthen the pursuit of long-term objectives, on the side of both investors and issuers, the Directive links the long-term perspective with the concept of sustainability, including environmental and social business.

17. Retrieved from www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html.

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Another way would then be to rely more on engagement with stakeholders and adopt measures to prevent and solve conflicts and disputes, using mediation techniques.

This is the approach followed by the OECD Guidelines for Multinational Enterprises. All governments adhering to the Guidelines are required to set up National Contact Points for Responsible Business Conduct (NCPs for RBC), agencies established by governments with a twofold mandate: to promote the OECD Guidelines for Multinational Enterprises, and related due diligence guidance, and to handle cases as a non-judicial grievance mechanism. In line with NCPs' non-judicial character, good offices include a range of approaches to support agreement between parties, from informal dialogue to professional mediation. According to a report[18] recently published, the 49 NCPs currently constituted have handled over 500 cases about issues located in over 100 countries and territories, addressing a wide variety of business impacts. NCPs have actively facilitated concrete remedies for the persons affected, including through financial or in-kind compensation or changes in companies' policies and operations. The outcomes of cases handled by NCP have also contributed to shape processes for the development of government policies, and to promote stronger policy coherence for RBC.

Similarly, the 2021 European Parliament Resolution, providing recommendations to the European Commission on corporate due diligence and corporate accountability, recommends that undertakings carry out in good faith effective, meaningful and informed discussions with relevant stakeholders when establishing and implementing their due diligence strategy (Art. 5) and that grievance mechanisms should be put in place (Art. 9). More specifically, undertakings should provide early-warning mechanisms for risk awareness and mediation systems, allowing any stakeholder to voice reasonable concerns regarding the existence of a potential or an actual adverse impact on human rights, the environment or good governance. Such grievance mechanisms should be entitled to make proposals to the undertaking on how potential or actual adverse impacts may be addressed.

Building a proportionate, appropriate and effective enforcement system, able to balance all the interests at stake and looking for a cooperative approach and win-win solutions, is a fundamental challenge and, in this context, techniques and expertise developed in the mediation of corporate-related disputes may play an important role.

18. OECD (2020). National Contact Points for Responsible Business Conduct, Providing Access to Remedy: 20 Years and the Road Ahead. Retrieved from http://mneguidelines.oecd.org/NCPs-for-RBC-providing-access-to-remedy-20-years-and-the-road-ahead.pdf.

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