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The globalized scenario has an inherent ambition to melt different cultures, and to pursue an increasing mutual respect amongst different people. The wider recognition of labour rights, together with the combination of economies, social models, religious cultures, leads nevertheless to an increasingly litigious society wherein labour law plays a major influence. Alternative Dispute Resolution (ADR) recall a set of procedural tools introduced to help the judiciary system to make (also) labour rights more speedily and easily recognized, and thus implemented. After a short overview on the ADR context, this paper is meant to particularly investigate weather mediation – as a specific ADR track – represents a way to move forward in labor law, and weather the European legal frame – as nowadays in force – is applicable to any work relations.

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Mediation *to Enforce* Labour Rights: How Far can the European Model for ADR be Beneficial on Employment Disputes

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The globalized scenario has an inherent ambition to melt different cultures, and to pursue an increasing mutual respect amongst different people. The wider recognition of labour rights, together with the combination of economies, social models, religious cultures, leads nevertheless to an increasingly litigious society wherein labour law plays a major influence¹. Alternative Dispute Resolution (ADR) recall a set of procedural tools introduced to help the judiciary system to make (also) labour rights more speedily and easily recognized, and thus implemented. After a short overview on the ADR context, this paper is meant to particularly investigate weather mediation – as a specific ADR track – represents a way to move forward in labor law, and weather the European legal frame – as nowadays in force – is applicable to any work relations.

1. WHAT EMPLOYMENT MEDIATION IS ABOUT IN EUROPE

“**D**ispute resolution may be viewed from the perspective of economics, negotiation or contract law, or game theory or even military strategy”². Within these possible applications, when employment disputes are at stake (especially where groups of undertakings, small enterprises and self employment are concerned) the “moral” dimension of ADR, meaning morality as the sphere of involvement of the human beings’ dignity, is particularly interesting. The increment in statutory recognition of labour rights, the financial pressure provoking social dumping, while economies and social models (that are always more interconnected) are asked to stay open to a deeper integration, leads to the necessity of a serious consideration of “mediation”, meant as a route to achieve joined solutions, considered satisfactory especially if compared with the long duration of an in-court-trial, also for being more in accordance with the workers’ specific feeling of personal dignity.

Before going into details, let me recall that ADR is the name for very different procedural models aimed at avoiding formal litigation as established in the various

Nation-States, and in such a meaning, it comprehend sets of “ruling procedures”.

Member States have notified to the European Commission more than 400 ADR schemes that they deem to be in conformity with the principles set up in the European Recommendations; nevertheless, ADR mechanisms have been developed unequally across the Union, and the number of ADR bodies, the procedures (arbitration, mediation, etc.), the nature of the initiative (public or private) and the status of the decisions adopted by ADR bodies (recommendation or binding decision) differ from sector to sector and among geographical areas³. ADR can be ruled in a way that is strictly connected to the in-court-trial⁴, or they can work as a completely unregulated field (for example Trade Unions ADR schemes can be out from a specific statutory consideration⁵, and in common-law countries many grievance procedures are established just within the management⁶). While considering this patchwork of (procedural) norms, what should be bared in mind in order to focus on mediation, is three main points:

1. Firstly, mediation is a part of ADR as a “*constructive behaviour of both sides on questions which are not worth to fight for*”, and as such it is not like formal litigation nor arbitration; mediation implies a preliminary ability to go out from the dispute itself, the skills to lead the parties to consider the dispute from an outstanding point of view;
2. Secondly, mediation as well as any type of ADR, is ultimately coordinated with the judiciary, the Member State or International tribunals which are supposed to uniformly apply the substantive law where there is no chance to solve a dispute

³ http://www.civic-consulting.de/reports/adr_study.pdf

⁴ For example Italian “conciliation” ex art. 412 c.p.c. was meant as a mandatory step to access the trial till 2010, and in some cases still is, while today it is generally facultative.

⁵ This is the case of collective arbitration procedures as provided for example by the Basic Agreement for workers’ representative in the Italian biggest auto-motive industry, dated 10 January 2014.

⁶ It is the case, for example, of Brown and Root Corporation a US private company with more than 30.000 employees that is just not unionized.

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¹Jhon T. Dunlup & Arnold M. Zack Mediation of Employment Disputes at http://www.ilr.cornell.edu/alliance/resources/Articles/med_emp_disputes.html

² Theodore J. St. Antoine, 2002, The once and future labour act: myths and realities, University of Michigan law School Scholarship Repository.

otherwise (art. 6 HCHR; EU Social Charter, art. 47; art. 24 Italian Constitution) ⁷;

3. Thirdly, for the comprehension of ADR and mediation possible development in labour law, it is necessary to remind the basic characteristic of the Continental European judiciary system, which comparatively explain why ADR development is told to be endorsed differently elsewhere (in the USA).

In Europe and North America ADR in labour law development show similar trends⁸. Italian ADR experience finds its roots within the experience of the *Probitviri* (local committees which were given the competence by the social parties to solve labour disputes outside the judiciary) and dates itself to the establishing Act n. 295/1893; similarly the North American experience of mediation dates itself back in 1898 with the Erdman Act for railway carriers. In both the USA and Europe, Trade Unions have played a major role in development of arbitrating procedures, and in both Continents, especially since the 70's on forward, there has been a shift toward more formal litigation, deriving from increasing recognition/violation of statutory rights⁹. Finally, a common background can be observed also in the recent years, when in both Europe and the USA the interest on ADR refreshes in time of economic crisis, and the judicial system itself is recognizing the necessity for a subsidiary help to cope with the function of settling conflicts¹⁰.

Despite these common features, the European Continental system traditionally approaches ADR differently from the North American model because of some basic differing conceptions of the justice system as supposed to grant the enforcement of law.

The European judiciary system is "inquisitorial" and tends to provide for a shared responsibility of both the claimants, on one hand, and the State with its

agencies, on the other hand, to enforce individual rights as provided by law¹¹; contrarily, the "adversarial system" that is operating traditionally in the USA, works insofar as the private parties are required to undertake the responsibility of fighting for their own rights¹². Thereafter, the European continental model, is oriented to see the judiciary as an authoritative intervention that imposes itself over the controversy, "*an imperative power that substitutes itself with the dissenting views of the parties*" rather than a "*composition of the interests in accordance to law*"¹³.

In Continental Europe, development of statutory law has proceeded together with the creation of special jurisdictions becoming exclusively competent for labour relations: there has been an exclusion of arbitration in labour law in Italy and Germany¹⁴, and also some administrative agencies working rather independently from the Government, like ACAS in the UK, officials are involved in conciliation only, while mediations can only be attempted by external experts, as if it was not really part of the "conventional/orthodox" system. The American features have lead to a general consideration of ADR (which involve an active participation by the disputants to a larger extent than in formal litigation) that it is rather familiar. While it has taken, and it is still taking, hard commitment, for ADR to be conceived in Continental Europe as normal, rather than just a time consuming, expensive route toward a form of private justice; ultimately, they are felt somehow questionable.

The European Continental system has been rather indifferent to institutional support to mediation, particularly, and significantly the European Court of Strasbourg did not pronounced itself over mandatory mediation being in contrast with art. 6 of the HCHR (right to a fair trial)¹⁵; the more recent European Directives and Recommendations encourage mediation in the broader context of ADR, but some studies found that such a cultural move is not going straight far¹⁶.

In the field of European labour law, arguably labour Unions' support too, has been conceived differently because of this differing conception of the judiciary system as a whole: in Italy the major Unions in the industrial sector – the private sector with the highest

⁷ See F.P.LUISO, *La direttiva 2013/11/UE sulla risoluzione alternativa delle controversie dei consumatori*, Riv. Trim. Dir. Proc. Civ. to be soon published, as for the connection of mediation as an agreement – following the rules on regularity of any common agreement – as different from the connection of arbitration or other independent authority decisions, asking for more stringent requirements to be considered valid within the legal system broadly meant.

⁸ Theodore J. St. Antoine, cited above; B. GRANDI (2011) Italian Arbitration in labour disputes: a comparative perspective over the matter of inderogability, in Rivista dell'Arbitrato.

⁹ See the a comparative analysis between Germany and the USA, the interesting overall perspective given by M. FINKIN, 2014, Workplace justice: does private judging matter?, in ZVGIRWiss, 113 (2014), 166-185.

¹⁰ Italian Constitutional Court on mandatory mediation in civil disputes (decision n. 272/2012) declared the "mandatory mediation" to be just beyond the legislator's mandate, and underlined that the European purposes to promote mediation to help the overload of the judiciary does not exclude mandatory provisions; see G. ABBAMONTE, *Il rebus dei tempi nella mediazione*, in Il Mezzogiornoeconomia 24 marzo 2014. Sharply, F.P.LUISO, cited above, p. 2, notes that EU Directive 2013/2011 indicates that ADR could help in reducing the judiciary load, but does not drive to that purpose anyway.

¹¹ The European jurisprudence affirms that provision should be made for legal aid where the absence of such aid would make it impossible to ensure an effective remedy (ECHR Judgment of 9.10.1979, Airey, Series A, Volume 32, 11).

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¹³ G. ABBAMONTE, *Il rebus dei tempi nella mediazione*, in Il Mezzogiornoeconomia 24 marzo 2014.

¹⁴ §§ 4, 101, III ArbGG (Labour Procedure Code), Italian Procedural Code of 1940 was reformed in favor of employment arbitration in 1966.

¹⁵ <http://www.cpdseminars.ie/articles/mandatory-mediation-and-the-hallmark-of-democracy/> late consultation 28th March 2014.

¹⁶ Skeptical on ADR substantial utility is M. FINKIN, cited above.

coverage as for unionization – uses to support employees with almost free legal advice (this means that they want to grant it as a sort of public service). While in the USA, where the recourse to a formal litigation has a higher cost, “it has remained in the province of unions and management to resolve their own disputes through reliance on ADR: with mediation of interest disputes covering the content of new collective bargaining agreements and arbitration of rights in the interpretation and application of such agreements”¹⁷.

Particularly after the famous ruling by the U.S. Supreme Court in 1991 *Gilmer vs Interstate/Johnson Lane Corporation* and the following Dunlop Report, chaired by the former Secretary of Labor John T. Dunlop (together with the increase of individual labor disputes¹⁸) it is registered a permanent progress into more mediation and ADR in the USA.

There are impressive figures about the success of “mediation” in labor law disputes: it is told to have a resolution quota of 85%¹⁹; in the railway and air traffic industry, that are significant once, comparatively more important than in Europe considering the higher mobility and longer distances, the National Mediation Board, providing for strict rules to be followed, reports that 97% of all conflict cases in its history have been settled peacefully²⁰. Some Canadian labor Unions have argued that the reasons in favor of mediation are overwhelming:

Substantive complexities in labour law across individual and collective claims

Fundamental	Rights	Rights	that are accessory
Collective	Rights/interests	Rights/interests	that are individual

Labour law disputes might objectively arise, at a first level, for the protection of some minimum standards to be mutually recognized as not derogable – according to the meaning of derogability/minimum standards as present in the National States and in the International Institutions (*fundamental rights*); labour disputes might arise nonetheless, at a second level, for the protection of any other right that the applicable law, statutorily, collectively, or individually negotiated, is recognizing to the interested worker (*accessory rights*).

particularly it is cheaper than arbitration, it allows the Union and the employer to control the outcome of the dispute to a much greater extent than they can at arbitration, it can be used as a way of getting rid of disputes that the Union has no desire to fight, in the case of persistent members who cannot accept that their case is a lost one in the Union representatives’ opinion²¹.

After recalling such differences at the procedural level, considering both the European and the American models, some points shall be remarked at a substantive level nonetheless.

ADR schemes have been more widely set up to solve disputes in financial services, package travel/tourism, telecommunications; this may be related to the frequency of occurrence of consumer disputes in these sectors and the size of related consumer detriment²². As for labour relations (which are treated via ADR to a much more limited extent, especially in Europe), the increasing litigation started from the 70’s presents an increasing complexity that is relevant for both procedural and substantial consideration²³; the complexity concerning labour disputes, for the purpose of this paper, can be simplified on a matrix which shows the object of labour law and its personal scope, and essentially re-poses the coexistence of individual and collective interests in the (now) globalized society.

These two first object-levels (*fundamental rights vs accessory rights*) interact with second two attention-levels: issues of fundamental rights and accessory rights, while we consider the scope of the substantive law, can be dealt with collectively or individually.

While the first distinction (*fundamental vs accessory*) is not clearly defined in any legal system, and relies upon a balance between economics and politics in a given society (balancing of interests), where the law is playing a role that is supposed to be neutral in theory, the second distinction (*collective vs individual*) is to be culturally found on the collective awareness of a society as well as on the individual consciousness

¹⁷ Important exceptions to Unions and Management jurisdictions are the several U.S. administrative agencies involved in ADR, for example the National Mediation Board for the railway industry; see also in JHON T. DUNLUP & ARNOLD, M. ZACK, cited above.

¹⁸ Between 1970 and 1992 an increase of 400%, alone in 1993 there were 93.000 discriminations complaints.

¹⁹ Hans-Juergen Zahorka, Mediation in Labour Relations: what can be learned from the North American and EU Example? Labour Legislation and Arbitration Project, EuropeAid/1136/C/SV/Rsu, Annex 5, available at: <http://www.libertas-institut.com/de/PDF/Mediation.pdf>

²⁰ Hans-Juergen Zahorka, cited above.

²¹ Why Mediation got hot in www.ufew.net/articles/Toolkit/mediation_inside01.html

²² http://www.civic-consulting.de/reports/adr_study.pdf

²³ L.MARIUCCI uses the category of complexity to explain the development of Italian labour law in the last decades in his Lecture on 24th March 2014, Bologna.

(whereas the different sources of law, and their intervention, can give the significant overall picture).

Considering the need to cope with the complexities showed on the matrix, ADR procedural patterns could be the best in position to cope with it, because of their focus on simplification and departure from "formality"; nevertheless, because the collective nature of the interests as implied, only ADR which operate through the search of the parties' true consensus, can overcome complexity by respecting fundamental rights at the same time.

The difficulties while to legally define the borders amongst the first distinction (*fundamental vs accessory rights*) stress the importance of promoting mediation as a forum where employers and workers, going beyond the legal definitions indeed, might achieve a solution that would particularly fit their circumstances and their personal feeling of justice, given the due consideration to their relative position of weakness.

The second distinction (*individual rights vs collective rights*) is rather highlighting the limits of mediation on the other hand, since a collective dispute over a labour matter is typically one involving economics and politics that might be put on the negotiation table as a matter of general interest, thus requiring negotiating and mediating skills as generally possessed by the spoke persons (trade unions and the management in its apical positions); moreover, "meritorious claimant with limited resources of a point of public exposure and so of a source of pressure on the employer, especially to settle"²⁴ might see their individual rights in shadow. The sphere of the so called "ADR of interest" is different from the "ADR of rights", whenever the dispute proposes legal concerns that are never being approached by any court before: there would be the land of the "no precedent" and mediation couldn't solve it out properly, especially in the light of a broader meaning of democratic legal system²⁵.

The arena where the need to encourage mediation comes out, is obvious: where the complexities of the legal scenario are so many, for example in cross border disputes and whenever the individual case is at a point of presenting more attraction to peaceful settlement than to go on trial, or even to waive one's own rights, there mediation can help at best. In many of these cases the choice of considering some goods or personal conditions as accessory rights rather than fundamentals is a very relative type of consideration, which is fully related upon

circumstances amongst which the cultural level of the disputants, also risen and refreshed by the mediator, plays the main role. It will be up to the personal consideration of the people involved, rather than to an *ex ante* decision by the legal system, to follow the mediation track in place of other ADR procedures or directly to go to the in-court-procedure. Insofar mediation too is felt as an imposition, it's very deep contribution would be frustrated.

The mediator supports disputants with special negotiation skills and techniques, particularly by knowledge of the substantive labour laws, but does not solve the dispute by authoritarian means, while in arbitration the third party has an autonomous authority to decide over the matter in place of the parties.

Because of this not authoritative role, the way the mediator must actually gain his credibility is amongst the crucial points to be investigated and ruled while concerning an institutional support to this type of ADR.

Mediation is defined as "*aprocess where the parties to a dispute – in labour relations: the employer and the labour union – invite a third party, the mediator, to help them resolve their differences; the mediator has no power of decision concerning the conflict between the parties, but helps to find and reach a mutually acceptable and voluntary reached solution*"²⁶. In other words, in mediation, as distinguished from litigation, and even arbitration, the parties retain control of their disputes and its resolution, instead of surrendering their case to a final decision by a third party.

In contrast with the prevailing image "*of an amateur effort by substantively unskilled do-gooders who approach substantive legal issues with a one-size fits all approach*", serious arguments are leading to the need of accepting mediation as a procedure for a reliable enforcement of also statutory rights, both fundamental and accessory, while capturing the profound and wide spread benefit of its possible outcomes in the globalized society.

II. CULTURAL LIMITS OF MEDIATION IN EMPLOYMENT LAW

Employment law developed in Europe, since the early decades of 1900, much according to a Marxian vision of separation (the separation of the workers' valuable activity from the capital value) that has spread its influence well across the Continents. It is also because of this perspective of separation (that is accepted within the classical economists method, from

²⁴ M. FINKIN, cited above, p. 169.

²⁵ M. FINKIN, cited above, pp. 183-185, concludes being skeptical about private justice, as that implied in mediation, told to be successful on "practical outcomes" but not on democratic policy as well.

²⁶ HANS-JUERGEN ZAHORKA, cited above.

Smith to Keyens too²⁷) that statutory labour law, in democratic countries, dresses a vision of the State (with its employment judiciary system) as an ultimate recourse for ending up the fight, through the imposition of a decision over the parties' inevitably divided will. Trade Unions as well, have been generally conceived in Europe, and in North America too, as fighters for the interest of the many working categories who was expressing a will just separated from the enterprises' intentions.

Trade Unions' protection has gone far in granting basic and uniform standards for almost every dependent worker, even independently from her/his association to the Union itself²⁸, facing "the big" employer. The consequence of such approach is that it is rooted in the labour law culture of many modern democracies a conception of not merely conflicting labour relations (the conflict was already clear in the 1800s liberal economists view, as already recalled): more dramatically, it has prevailed a conception of "original separation" amongst the disputants that has lead to the assumption of "in-court-trial" being natural in order to impose a "super partes" decision. Thereafter, mediation is considered to be rather a non-sense route that is leading nowhere, a route not compatible with a vision of a separated scenario wherein one must necessarily choose where to belong.

The open-globalized scenario has not shadowed this conception, but it has proved the Trade Unions' action, and the Employment Tribunals working along for restoring of workers' rights, to be weak when facing the employers' freedom to move towards innovation at lower costs. If innovation is to be reached, and the employer is supposed to arrange the workforce accordingly, there it comes to a matter of "general choice" that cannot be dealt with as a point of just conflicting individual (or group of individuals) rights. The Fiat case in Italy²⁹, as well as the several cases that

have been brought before the European Court of Justice³⁰ set out choices that are of general/political interest in their substance, and the courts themselves can only add a technical contribution to orientate the solution of the substantial dispute, which is finally going far beyond a possibly "super partes" application of the law.

In such new conflicting context, the fight has shift from "separation of capital from workers", which is still far evident in the less developed areas, to a ruled game where the political institutions are using several tools, amongst which we find the statutory law, to drive the economies not only to grant protection to workers, but to achieve a better quality of occupation too, to encourage green economies as well, to assure a sustainable growth in a broader meaning, to encourage workers' participation in the capital.

In such a context, disputes arising in employment relationship, generally in term of challenge on the occupational levels, any mediator should be an expert not only in employment, but in social science and psychology as well. Labour lawyers acquired their skills in a context where labour force is considered all but not a commodity, and got used to denounce any type of social development as just meant to consider the employees as goods to be possibly sold. Now these traditional values must be balanced with the search for sustainable growth and projects for green policies, in other words, the laws ruling labour relations must be balanced with other laws ruling substantial fields just interacting in the economic sector that is in point.

It is still a matter of going left rather than right, but it is far from easy to state what is left and what is right. The conflicting policy scenario is well emerging, at the judiciary level, by comparing the European Union constitution, that is fully based on economics and movements of people, with the European National constitutions, that are social contracts establishing social/governments based on democracy and territorial governance, but for giving precedence to the legal supremacy of international/European law³¹.

The labour claims brought before the European Court of Justice in nearly 2007 and regarding posting of workers, strike and the social dumping as a general policy issue staying underneath the business choices at stake, gave a clear picture of the relativity of the power that the judiciary system can play while asked to interpret the laws from a "super partes point of view". The table above is referring to this relativity too: it illustrates the (growing) extent of the orange zone, which

²⁷ P. TRIDICO, Flessibilità e istituzioni nel mercato del lavoro: dagli economisti classici agli istituzionalisti, un *Economia & Lavoro*, Anno XLIII, Saggi, 113-139. The Author found that, except for marginalist economists, the classical economists see the equilibrium in the economic system as one theoretically implying a given wage, thus not granting full employment nor greater productivity. These are theoretical assumptions that bring along social conflicts.

²⁸ This has been done by virtue of an extended interpretation of the scope of the legal effects deriving from collective agreements, or by virtue of a statutory provision for the collective agreement to be binding for all, or, in common law countries, by virtue of some closed-shop clauses which are forms of union security agreement under which the employer agrees to hire union members only, or require the employees to join the union if they are not members already.

²⁹ The FIAT case brought the matter of trade union's representativeness before the Constitutional Court; since the main union (CGIL) was denied to have trade union's right on the premises because of its refusal to sign the FIAT proposal agreement, the Court was called to decide whether the statutory provision requiring the signature of a collective agreement to be representative was consistent with the freedom of association and fair treatment for any established union.

³⁰ Particular relevance have had the Laval, Viking, Laval, Ruffert and Luxemburg, commented by several Authors in A. ANDREAONI, B. VENEZIANI (a cura di) *Libertà economiche e diritti sociali nell'Unione Europea*, Ediesse, 2009.

³¹ L.Cavallaro, *Servitore di due padroni, ovvero il paradosso del giudice del lavoro*, RIDL, 1/2014.

is the mixture amongst fundamental, accessory, individual and collective rights, making it evident how the legal borders are not so apparent as in the other cells of the table, where it is still possible to draw the limits of what is legally individual, collective, fundamental, accessory. So far as it is possible to draw the line, that far the courts might still play a “super partes” role and recognize the supremacy of one right over another, whereas in the orange zone, any intervention of the judiciary is going to become a political decision.

This is why the orange zone becomes the growing sector where a skilled and neutral mediator would facilitate the difficult choices to be made to solve the disputes or even to prevent the conflict. He would help the parties to consider their interests from out of their dispute.

There can be a refusal to undertake ADR where the judiciary system is seen as the only one having the full range of tools to ascertain facts and relevant laws: in some North American practices, ADR is suggested to be not the best way to solve a dispute in “*cases of continuing struggle with (.....) discriminatory practices or a subcontracting decision in a union setting that may determine the employer's future economic viability; in these cases, the importance of the issue warrants use of the full legal process which is best served by full scale advocacy of opposing viewpoints before an experienced and neutral tribunal*”³². Such a conclusion is in accordance with the construction of a judiciary system that is called to play a neutral role, but by declaring the winner party's stronger arguments. So the question is: are the “in courts” tools to ascertain facts and relevant laws really neutral? What is more neutral of a procedure granting the parties' full awareness about legal and less legal implications, in and out from their dispute?³³

Over these kind of cultural limits, there are several statutory obstacles that stays against the European proposals to stress mediation in labour disputes forward, as I am going to illustrate here below.

III. THE PROCEDURAL RULES FOR MEDIATION IN EUROPE AND ITALY

Article 47 of the European Charter (Right to an effective remedy and to a fair trial) says that everyone, whose rights and freedoms guaranteed by the law of the Union are violated, has the right to “an effective remedy before a tribunal”, that everyone is entitled to “*a fair and*

public hearing within a reasonable time by an independent and impartial tribunal previously established by law”, that everyone shall have “the possibility of being advised, defended and represented” and to those who lack sufficient resources, in so far legal aid is necessary to ensure effective access to justice, legal aid shall be made available.

The EU Charter of Fundamental Rights complements, but does not replace, national constitutional systems or the system of fundamental rights protection guaranteed by the European Convention on Human Rights. In other words, the enforcement machinery of the EU Charter is very different from that of the parallel instrument of the Council of Europe in the field of human rights: the former covers the breach of European laws only, and relies on supervision and implementation by the EU Institutions, included the European Court of Justice, while the latter allows for direct individual complaints to the European Court of Human Rights, which delivers judgements that are directly binding on individuals. Whereas the enforcement of the European Convention is direct, enforcement of the European Charter is rather passing through a system where judicial and substantive rules delivered by both the EU and the Member States must be coordinated.

Given such a scenario (international judiciary system), to inquire over mediation in labour disputes implies an effort of investigating procedural rules on both national and European level.

Let's remember the main European references on ADR first.

The European Commission adopted two Recommendations on ADR (98/257/EC and 2001/310/EC). The first one dates 1998 and was a follow-up to the conclusions of the 1993 Green Paper on access of *consumers* to justice and the settlement of consumer disputes in the single market; it set few basic principle for ADR schemes to operate, essentially by describing an active intervention of a called third party, frequently an arbitrator, who is thought to find and impose a solution in accordance to the following principles:

- Independence of the decision-making person/body
- Transparency of the procedure
- Adversarial principle
- Effectiveness as to the aspects of access, costs, time to decide, active role of the decision making body
- Principle of legality (no prejudice on the mandatory protection as granted by the national law
- Principle of liberty (for the parties to accept a binding decision)
- Principle of representation.

The second Recommendation in 2001 (2001/310/EC) contemplated ADR schemes as attempts to bring the parties together and convince them to find a

³² http://www.contilaw.com/practice_workplace.php

³³ Frequently ADR schemes carry out collective investigations, i.e. if many claims against one trader are similar they undergo the same investigation, or just a sample of them are investigated, then all the parties settle individually on the basis of those decisions (http://www.contilaw.com/practice_workplace.php)

solution by common consent. Therefore, it newly ruled over mediation. Principles to be followed were:

- Impartiality
- Transparency
- Effectiveness
- Fairness.

In such a context it was far from easy to delineate where, in practice, there was floor for a private judge (an arbitrator or a conciliator) to impose his solution and where for a mediator to search for consensus; the procedure to be followed turns to be significantly different. In the first case formality is prevailing, while in the second case, consensus and research of consensus being the priority, formalities are less important. The overall aim of any ADR procedure stressing the importance of trying to mediate is immediately understandable: it is a matter of pursuing a rather peaceful and responsible acting of any person or group of people involved over the need for an authoritative type of intervention.

Later, Directive 2008/52/EC of the European Parliament and Council (21 May 2008) on mediation in *civil and commercial matters* gave binding effects to the earlier Recommendations, and specified that its scope was to facilitate access to ADR and to promote amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings to civil and commercial matters.

Exceptions on the Directive applicability regard *"rights and obligations which are not at the parties' disposal under the relevant applicable law"* particularly revenue, customs and administrative matters or to the liability of the State for acts and omission of the State Authority.

Now, since the 2008 Directive makes reference to civil and commercial transaction only, but broadly meant, it is not clearly comprehending employment disputes, neither it excludes them. Insofar as we consider employment law as a part of the civil legal sector, and define employment as a rather separated field of legislation (where the public intervention is prevailing and ready to maintain a sort of administrative authority over the parties' disposals), then the Directive is not applicable; contrarily, if we do understand labour relations as part of the civil legal sector, then we could theoretically refer the 2008 Directive to many labour disputes too, particularly to those which are implying rights and obligations being at the parties' disposal³⁴.

Expressly, at preamble 10 of Directive we can read: *"it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law"*. The European legislator, on its part, is thus not excluding employment disputes *a priori*.

Recently, in 2013 the European Union delivered both Directive 2013/11/CE on ADR for consumer protection and Regulation 514/2013 providing for a mandatory *on line platform for the protection of consumers*. These two Acts are thought to be interconnected, and should be read systematically, since the Regulation – that is immediately binding and delivers direct effects on individuals – disposes for all the ADR bodies to be connected to the one IT platform. Preamble 19 of the 2013 Directive, states expressly that it should be prevailing over Directive 2008/52/CE, just in case of any conflicts. Thereafter, we can observe no news as for the substantial scope of the law on ADR after the 2008 provisions: employment disputes are not excluded *a priori*³⁵.

As for the type of normative support that the EU provisions are giving to mediation, the 2008 Directive does not prevent national Member States from providing also "mandatory" interventions (art. 5). Art. 1 of the 2013 Directive seems to be quite open to mandatory mediation provided by the national legislators also, insofar as it is going to not frustrate the right of the disputants to access the judiciary system.

One of the major controversies in ADR promotion, indeed, is its relying on an authoritative intervention. It is in the (correct) opinion of many Italian lawyers that ADR (and mediation) is *"to be trusted, but for its success to be relying on a free and aware choice by the litigants, as well as on a judicial system which must be trusted, and be efficient, as well"*³⁶.

2013 Directive is meant to facilitate the enforcement of rights, in consideration of ADR being complementary to the judiciary system, on one side, and in consideration of the overloaded conditions of the latter (see the connection with Directive 2009/22/EC and Regulation EC No. 2006/2004 on enforcement of consumers' protection interests and laws). It is in this perspective (enforcement of rights) that we can try to investigate whether the European provisions on ADR can support somehow the need for a cultural focus on mediation in labour relations too, and possibly a direct effect to already legitimate mediations in emerging labour relations.

³⁴ Here it comes the critical point as above highlighted: what is at the parties' disposal and what is not? What is fundamental and what is accessory? What is not at the parties' disposal, surely, are the so called fundamental rights, like those defined in our national Constitutions and in International fundamental charters (for example the right to be not discriminated), while it seems to be possible a mediation having in object any accessory rights, that the workers'

might decide to waive in order to get an overall satisfactory compromise or agreement (example the right to claim for the full remuneration as previously agreed).

³⁵ F.P. LUISO, cited above, accurately investigates over the scope of the 2013/2011 EU Directive.

³⁶ G.ALPA, at <http://www.altalex.com/index.php?idnot=65513> last read on 15 April 2014.

Going to the (Italian) national level, the 2008 EU Directive on civil and commercial disputes was implemented in Italy by an Act of the Parliament (Legge n.69/2009, 18th June) and a subsequent Act of the Government (D.lgs 28/2010³⁷, March, 4th) providing for a mandatory procedure to mediate in some specific cases (properties, heritage, medical faults, etc.). Separately, Act n. 138/2010 , for employment disputes specifically, provided for both rules on arbitrating procedures and conciliating attempts (to be made before going to in-court-trial) but no express provisions were made to promote mediation, perhaps in the apparent confusion of taking conciliation for mediation.

Italian conciliation is different from mediation since it implies a proposal by the impartial conciliating commission that not necessarily comes out from an amicable settling; conciliation as newly ruled, is far from having the nature of a mediation, in that it is still the expression of a third party to make a satisfactory proposal to stop the dispute, furthermore, several legal dispositions now highlight the judicial-like authority of the administrative conciliators³⁸, which imply a sort of influence on the later judge made decision (in the event of an access to justice, in other words, in the event conciliation substantially fails and the litigants go back to litigate).

Today employment disputes do not require anymore a “mandatory-conciliation” before the administrative provincial agencies (DPL Direzione Provinciale Lavoro), except in few cases when it is in dispute a work contract that has been previously “certified”.

In such a normative context, there seems to be no floor for European procedural rules on mediation to be applied. Nor it can be said that mediation in labour disputes is accidentally practiced whenever the disputants opt to settle their case at the trade union places; that is a mere attempt to negotiate by help of someone who is not neutral, although skilled and arguably technically prepared.

Evidently, in accordance to a rather prevailing view, that looks at social security and labour law as two pieces of the same medal (in a common perspective of public labour law, which tends to consider the employer as a public actor!) in Italy labour relations are generally considered out from civil disputes and treated separately by the legislator. Moreover, the Italian tradition considers ADR in employment law (arbitration) as an exclusive province of the trade unions³⁹, whereas only in 2010 (Legge n.138/2010, so called “Collegato lavoro”) arbitration has been conceived for the individual

disposition of the litigants also, and “equitable arbitration” – award delivered not only in accordance to strictly statutory law – has been introduced. Scholars use to debate over the issue of labour law and civil law in terms of interconnections since the beginning of labour law as an autonomous field of studies⁴⁰.

If we maintain ourselves open to a contamination of civil law in labour law, it is important to recall that D.lgs 28/2010 on mediation was questioned before the Italian Constitutional Court. The question was weather that (mandatory) mediation was consistent with art. 24 of the Constitution, assuring a fair trial and defence before an independent judge for all; the Court stated it was not, but for the uncorrect procedure of the legislative process⁴¹. Few times later Italian Act n.98/2013 (so called Legge “del fare”) introduced back the mandatory attempt to mediate in civil disputes. Still there are doubts as weather the legal frame as in force nowadays is just repeating the same imperfections that the 2010 Acts brought along. These imperfections, that were not investigated openly and fully by the Constitutional Court, are dealing with:

1. The imposition of a procedure, that could represent an infringement on art. 6 ECHR;
2. The additional cost that the mandatory procedure does imply on detriment of the poorer;
3. The consideration of *skills and knowledge of mediators*.

Particularly the skills and knowledge that the EU normative scenario is requiring on the persons acting as mediators seems to be weakly assured by the Italian 98/2013 Act; those requirements are linked to the attendance of few hours of learning, which quality is not much under concern, and more dangerously, any lawyer is considered to be a mediator just because already he is a lawyer (such an assumption does not recognize the peculiarity of the social role of this profession, that was

⁴⁰ About this theme, in Italy: P. ICHINO, 2011, Il percorso tortuoso del diritto del lavoro tra emancipazione dal diritto civile e ritorno al diritto civile, Relazione al convegno dell'Associazione dei Civilisti Italiani su Il diritto civile e “gli altri” Università “la Sapienza” di Roma – 2nd December 2011; L.Cavallaro, cited above. For an American perspective over the matter of private judging, and its questionable effect in the light of the democratic principle, M. FINKIN, cited above. Against privatization in this field Theresa M. Beiner, The many lanes out of court: against privatization of employment discrimination disputes, Maryland Law Review, 837, 2014.

⁴¹ See at note 10. The Constitutional Court stopped the enthusiasm about mediation, but did not find any prevention from obtaining justice before a tribunal in the Act, as also art. 6 of ECHR is affirming; the court underlined that the introduction of a mandatory form of mediation is in the power of the Member States, in accordance with Directive 2008/52/EC, that is not indicating any limits in such a perspective, but for an effective right of anyone to choose the formal trial (Decision n. 272/2012).

³⁷ 4th November 2010 amended in 2011.

³⁸ See, as example, art. 411 Italian Civil Procedure Code, co. 2.

³⁹ Trade unions were ruled by (public) statutory law in the Italian corporativist/fascist period (1922-1943).

in the mind of the Italian legislator as peculiar since 1958⁴² if not earlier).

IV. CONCLUSIVE ARGUMENTATIONS

The European legal frame for mediation, read together with national/Italian one, is not directly and expressly concerning employment relations.

Nonetheless, there are at least three reasons why we can argue that employment disputes having in object rights that are at the workers' disposal might fall under the applicability of ADR procedural provisions for mediation. From a legal policy point of perspective, perhaps, also some of those rights that are, theoretically, not at the parties's disposal, might fall under the beneficial effect of accessing a mediation procedure, once the party could recognize the prevalence of some other interest.

Reasons for arguing that mediation procedures – provided for consumers' protection – are available for also employment disputes are the following:

1. Consumers and workers are treated by the legislator similarly, in consideration of their weaker position;
2. No express provision is denying the possibility to access mediation procedures, standing the right to access the competent employment tribunal in case of failure;
3. From a legal policy point of perspective, this would be easily fitting self employment relationships, and particularly professional activity that might fall under art. 57 of the European Treaty. It can be proposed that the implementation of this tool would increase the *level of enforcement* of both employed workers and self-employed workers, giving the opportunity to seriously consider enforcement of also those self-employed being economically dependent on one single employer, also in accordance with the purposes of the European Parliament Resolution regarding "Social Protection for all, including self-employed workers" (dated 2014, January 14th). This late EU Parliament Resolution (point 23) sets a strong support to the proposal of a scoreboard of key employment and social indicators, which could be a first step in identifying concrete benchmarks, and mediators may easily list them, helping the development of the judiciary already fighting bogus self-employment in courts.

a) *The weak position as a preliminary point where to start from*

A research path to match protection of consumers and protection of workers legislation is notably the focus over the substantive weak alike position of consumers and workers, whenever they face

big (sometimes small) business that are taking advantage on them. The weakness of the individual consumer comes out from his/her indirect relationship with the producer – especially when buying from the internet – from his/her ignorance about the producing process and the risks implied in the using of what is bought, the possibility of hidden imperfections. The weakness of the worker, on the other side, comes out from his/her income relying on the employer's remuneration, as well as from her/his conceiving personal dignity in connection with the working activity. In both cases, a matter of distance and unbalanced power, as well as a matter of undisclosed information, can prevent from an easy solution of a dispute, sometimes it prevents from even denouncing the problem; the fact that only in working relationships the entire person – perhaps his/her family too – is involved, whereas in consumers issues the matter involves an object or a service, does not mean the legal parallel cannot be followed whenever the solution is to be found, preferably without going to trial. To investigate working relationships within the legal frame of civil laws, is a theoretical argument that plays in favour of this parallel to be followed, while encouraging ADR.

b) *None express provision is keeping employment relations out*

As reported above, the 2008 Directive on civil and commercial protection is not expressly denying the possibility that also employment issues are dealt with it – but for them to be related to rights that are at the private parties disposal.

Moreover, Directive 2013/11/EU (amending Regulation No. 2006/2004 and Directive 2009/22/EC) affirms that: "*As advocated by the European Parliament (...) any holistic approach to the single market which delivers results for its citizens should as a priority develop simple, affordable, expedient and accessible system to redress*"⁴³.

The EU Parliament Resolution of 25 October 2011 clearly stated that an horizontal approach to ADR is to be pursued, and by doing so it also welcomes the Commission consultation on ADR. The Parliament believes that ADR forms part of a general 'justice-for-growth' agenda across sectors and takes the view that "*any approach to ADR should go beyond consumer disputes so as to include business-to-business (B2B) civil and commercial transactions, irrespective of whether they are carried out between private or public undertakings, family disputes, defamation cases and other general interest disputes or ones involving parties with different legal statuses*".

So, employment type of issues are not mentioned, but other types of issues that can be even

⁴² It is dated 21 march 1958 the first Act – n. 253 – on the profession of the mediator.

⁴³ Point 8.

less at the parties disposal, like it is in family issues, are mentioned instead, therefore one can argue that the mentioned horizontal and holistic approach is not forbidden in this field at all.

c) *The legal policy perspective.*

As for the legal policy perspective, to extend ADR, with their tools and mechanisms, to also work relationships, is a possibility that is theoretically already possible for self-employment type of working relationships, particularly for professional activities that might fall under art. 57 of the European Treaty. Contrarily, the same extension surely would pose questions on laws protecting dependent workers: in national legislations implying a theoretical inderogability of labour law as a whole field regarding dependent workers⁴⁴, as the Italian one tends to be, the matter must be analysed deeper.

As for self-employment, the European Treaty, at the now art. 57, states that *"services shall be considered to be 'services' within the meaning of the Treaties where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons"*. Although the provision states that service *"shall in particular include: (a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions, and literature regarding the content and possible meaning of this provision is to be investigated, as well as the literature about distinction amongst free movement of service and right of establishment, what is plain clear is that the norm aims at covering the main traditional economic sectors. Industry, commerce, transports and liberal professions are mentioned, and although the agricultural, the financial, communications, health service are not, the Court of Justice delivered a broad definition of "service" here. The ECJC's definition is simply relying over the economic nature of remuneration of the service (it includes hazard games too⁴⁵). Therefore, we can firmly say that art. 57 does not imply a particular distinction regarding the position of workers. It means that a service under the European conception – as well as under the national one – can be provided by form of a personal activity, individually*

performed, as well as in form of a larger businesses, including enterprises investing capitals and having employed workers. Any service offered under a remuneration is covered by art. 57.

This definition gives us a vehicle to transport any work relationship, which was involved in the service as in object, onto the sphere of consumers' protection, and particularly for the purpose of this essay, onto the applicability of those European procedural rules to be followed in case amediation is called to solve a dispute.

To give an example, anything is preventing from mediate – so to apply the standard rules on European mediation – in case a consumer is not satisfied with the service as provided from both the single professional worker, as well as from workers who are just employed by the body that made the contract – although these disputes might rise very different type of concerns.

Both the rights of a regular employee engaged to perform, let assume, in an health service, and the rights of a self-employed engaged in the same sector, being he/she economically dependent or not, could be the object of a mediation procedure. Fundamental rights that would likely follow in the sphere of "inderogability", of the "not at disposition" by the individual person, might arise in each of these cases – let's think about the filed of safe and security provisions in the workplace or about the field of discrimination.

Once the "not to be disposed by the private parties" nature of the concerned right would come out, there mediation would be not an available track, accordingly, first, to the 2008 EU Directive. The employer who would have entered a mediation-negotiation sic et simpliciter, might encounter big problems deriving from art. 2112 c.c.. which is a national norm protecting the genuine consensus of the worker as a weaker party.

Here again, comes the burderline matter, or the "certainty matter". Which are the labour rights that cannot be disposed by the parties? What about them if a statute and labour tribunals together do not give a fixed reply yet? To be concrete, what about the case of a service sold but involving labour activity? For example a medical activity might have included the work of an healthcare assistant. Not to try to mediate in such a case does not really appear coherent with the horizontal approach that the EU Institutions are encouraging.

From a procedural point of perspective, it is important to stress the fact that only in a preventive consultation the parties can become fully aware about the fundamental nature of the concerned rights and the connected inderogability of them. Fundamental rights that are not at the parties' disposal in theory, might become rights that the parties are willing to waive in order to end up the fight (ex. the fundamental right to a just and proportionate remuneration can be waived to

⁴⁴ May I cite here my work "Let's deconstruct the meaning of dependent work to enlarge the scope of labour law", which is about to be published in the International Journal of Business and Social Research (<http://thejournalofbusiness.org/index.php/site>)

⁴⁵ See at : http://ec.europa.eu/internal_market/services/docs/infringements/art56-services_fr.pdf where it is reported jurisprudence underlining : *La notion de 'services' au sens de l'article 50 CE implique qu'il s'agit de prestations fournies normalement contre une rémunération et que celle-ci constitue la contrepartie économique de la prestation et est définie entre le prestataire et le destinataire du service* (Case 169/08, Presidente del Consiglio dei Ministri Vs Regione Sardegna, 17th Novembre 2009).

achieve a more personal type of recognition or a mobility disposition). Mediation is fully part of that consulting first phase that any reasonable person decides to go through, before recouring to courts.

The mediator, whose role is different from any other consultant for his/her deeper ability to search consensus, is supposed to have the personal capacity and the professional skills to make the parties aware about the fact that some of the rights which are dealt with, need to be considered theoretically not at their legal disposal, and that the courts will be tending to decide accordingly.

Of course, the management of such rights in a private sphere, does not play in favour of the public relevance of denouncing the offence, and, more finally, to grant the democratic controll over important decisions.

Specifically for labour law, it is questionable the idea that the trade unions' voice – as expression of the collective policy on labour rights – could be not considered while labour rights are in point.

The mediating panel is going to likely witness the forgiveness of many offences. This is something not to persue neither to suggest from a civil justice point of perspective. Insofar forgiveness is to be considered an attitude of the spirit, different from any civil interests and civil choices, its occurance does not change much the proposed conclusion when mediation is reached in a public panel, nor when it occurs before a court or within the trade unions' places.

As a matter of fact, the attitude of the spirit, as well as any political considerations (trade unions politics in our consideration) of the interested people, do have an impact on the searching of the better solution to the dispute.

This allows to reach a conception of those rights, which are theoretically/legally retained fundamental, as fundamental in the opinion of the really interested people too. This is consistent with the fact that mediation, in case where fundamental rights are concerned, would not prevent any eventual waiver (but made conscious about such a waiving by the mediator) to go on court in case he/her wanted to go back and brake the mediated agreement.

Rebus sic stantibus, the parties can benefit from a procedure that really puts them in position to search for the better, informed, not forced by others, solution; they can formalize it without necessarily stick with it forever, only insofar as the balanced positions will be finding their equilibrium in the next future, keeping in mind a judiciary system that is ready to reverse false perceptions and achievements. There shall be space for a justice that considers the passing of time, that is not strictly self-referencing, that is measuring itself with the social perception of the human dignity, that is what justice is though to serve for in the long run.