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[1] *This is the presentation at the Seminar organized by the European Court of Arbitration in 2013 in Rome.*

General comments

There are various means of resolving a legal dispute between two parties, concerning "available" rights.

i) private negotiation, whereby the parties transform a legal d*ispu*te into an economic dispute, without the need for any (legal) assessment of their reciprocal rights. They independently enter into an agreement (the settlement) which is the instrument whereby both parties obtain certain economic benefits, by means of reciprocal concessions. By means of this agreement the parties prevent or settle the dispute without interfering with their right to challenge the agreement using normal means relating to the formation of their intent (mistake, duress, fraud) in order to obtain an annulment.[2]

ii) non-procedural arbitration. The parties choose to make recourse to a third party, and seek "*settlement of the dispute by arbiters by means of a contractual decision*".[3] They substantially appoint an arbiter to settle the dispute.

iii) recourse to State Courts which, under Italian law, is guaranteed by article 24 of the Constitution,[4] or rather the Arbitrator in the form of a private judge who is asked to verify which right is being enforced and to settle the dispute by means of a decision (or an award), and thereby by means of a concrete rule that the parties must comply with ("the order"). In this case, contrary to mediation, there is a "winner" and a "loser" and the latter is entitled, within certain limits, to challenge the "decision", due to *error in procedendo or in judicando,* or the award, due to invalidity, for the purpose of obtaining an amendment to it[5].

[2] M. Bove, *La conciliazione nel sistema dei mezzi di risoluzione delle controversie civili*, in Riv.Trim.Dir. e Proc. Civ. 2011, 1065 and ff.

[3] Non-procedural arbitration is governed by article 808 *ter* of the Italian Code of Civil Procedure, under the Italian legal system.

[4] Art.24 Italian Constitution *"Everyone can take judicial action to protect individual rights and legitimate interests".*

[5] V. Vigoriti, *La Direttiva Europea sulla mediation. Quale attuazione? in Riv.Arb.2009,1 and ff.*

iv) mediation whereby the dispute is overcome, with the assistance of a third party, without any winners or losers and there is no possibility to dispute whether the result is unjust or whether it harms one of the parties' rights and, definitively, there is no possibility to challenge the settlement (save in this case also for challenges based on mistake, duress or fraud).
Mediation, which is normally considered an ADR scheme, is a means for resolving disputes through a third party (independent, impartial, equidistant) who has the task of assisting the two parties in the search for an amicable agreement, at times by means of the formulation of a proposal. According to a well-known definition, mediation therefore represents, "*not a form of alternative justice",* but rather "*an alternative to justice*". [6] [7]
Based on the above, it appears evident that there is a fundamental difference between "private" justice whereby the intention of the parties to submit to the decisions of a third party is essential ("consent") and justice which is provided by the State structure, in the context of its specific activities, terminating the dispute by means of an authoritative order which the parties must comply with.
Definitively, in the context of ADR two alternatives have been identified:
- arbitration, which results in a ruling equivalent to a decision and therefore an authoritative order;
- mediation, where the agreement reached is contractual.
Unlike arbitration, whereby the parties voluntarily exclude state jurisdiction, mediation is a procedure in which the Courts are only temporarily deprived of jurisdiction, in the sense that pending agreement (or the absence of agreement) between the parties, they cannot engage in any activities.
However there are analogies between the two procedures: both originate from and are rendered valid by a written contractual clause; both result in an order which can become enforceable if approved, i.e. by way of a purely formal judicial control, whereby the State Court verifies that the award or mediation agreement does not violate any mandatory laws, rules of public order or public policy.
We will see that mediation procedures conducted before a mediation organization, (accredited Body) must be connected with specific substantial effects such as an interruption in limitation or prescription periods and the enforceability of the order contained in the settlement approved by the State Authority (in Italy the President of the Court).
Following this necessary introduction, below is an illustration of the various points of my report.

I. Legal framework applicable in relation to ADR for commercial matters in Europe.
Primarily it is worth mentioning the *Consultation Paper, a* document published by the European Commission in 2011 (DG Sanco) on the use of ADR schemes for commercial matters in Europe which follows, inter alia, the 98/257/ EC and 2001/310/ EC recommendations and Directive 2008/52/EC.
This document concerns consumers in their cross-border relationships. In line

[6] Francesco P.Luiso, *Giustizia alternativa o alternativa alla giustizia*? in Il Giusto Processo Civile, 2011

[7] Confucius considered it undesirable, disgraceful and even immoral to commence litigation and bring an action, and recourse to the Courts was considered the last "alternative" for settlement (cfr A. Miranda, *Le origini della mediazione nell'esperienza inglese* in Mediazione e conciliazione. Diritto interno, comparato e internazionale, CEDAM, 2011).

with "*whereas"* number 2 of the 2008 Directive, it reiterates the need to facilitate access to justice using alternative non-contentious procedures which are contractual in nature.

The aforementioned recommendations tend not only to promote access to and the efficiency of justice, but also a reduction in the timeframe and costs for ADR procedures as compared to ordinary processes and an obligation for European Member States to legislate in relation to civil and commercial dispute settlement[8].

Again, in 2009 the DG Sanco Commission, with the collaboration of the Berlin Civic Consulting, launched a study on the operation of ADR schemes in European Member States which found that "*the fundamental principles contained in the 1998 and 2001 recommendations have been adhered to and implemented and there is now no discussion with respect to the existence of these schemes but rather only with respect to the manner of resolving the dispute"*[9]

There is also the so-called Green Book (published on 19 April 2002 by the European Commission) which continues to uphold the concept whereby ADR schemes can represent a remedy to difficulties arising out of the high number of procedures and their cost. It resulted in legislative ventures that ultimately resulted in the enactment of Directive 52/2008.

Amongst the various problems dealt with and mentioned below, with reference to cross-border mediation, the most important problems concern conflicts of laws, difficulties arising out of language and logistical barriers, interruptions in prescription and limitation periods and the enforceability of the mediation agreement.

The 1998 and 2001 recommendations also illustrate more important aspects for ADR procedures such as:

- the need to "*strengthen consumers' confidence in the internal market*" and
- an obligation to "*guarantee the impartiality of the entity, the effectiveness of the procedure, advertising of the scheme and its transparency, also due to the need to remove disproportion between the economic scope of the dispute and the cost for legal settlement*";

The 2001 recommendation specifically reiterate the same aspects as well as the following principles :

- fairness in the procedure based on a guarantee of the right to information and the parties' freedom.
- impartiality, which involves the need for careful selection of those responsible for the procedure, with fixed term appointments and relief from duties due to just cause only.
- transparency of the procedure, which consists of informing consumers about how the scheme will operate, the types of dispute that can be subject to these procedures, the most suitable mediation organization (accredited Body), the language used, costs and the governing law as well as the substantial effects of the procedure.
- effectiveness connected to contained costs and proportional to the value of the dispute and to the fact that the parties need not necessarily be obligated to seek the

[8] A. Miranda, op.cit. pg.91 not only refers to costs due to the length of process but also to economic costs, the uncertainty of the result and social costs due to " *an alteration in the relationship of trust between society and justice and therefore also between society and institutions"*.

[9] V.Vigoriti, *Europa e Mediazioni. Problemi e soluzioni*, in Contratto e Impresa 2011, fasc.n.1 pg.81

assistance of a professional or advisor.

Additionally:

- a confidentiality obligation with respect to information that parties provide to the person responsible for the procedure;
- the reasonable amount of time given to the parties to examine the possible settlement prior to definitively accepting it and
- an information obligation regarding the substantial and procedural effects resulting from out-of-court settlement of the dispute.

Based on the above, a first conclusion can be drawn: for the full realisation of existing legislation it is necessary to ensure the dissemination of a legal culture that promotes dispute resolution settlement schemes outside the ordinary process and, at least within Europe, this requires a reduction in the differences between modern legal systems and a need to harmonise and standardise legal models and specifically conflict resolution models.

II. A new dispute settlement method.

II.1 Characteristics of mediation

It is generally held that a mediation procedure is both:

- convenient (fixed and relatively expensive costs). This aspect also depends on the need for the technical assistance of a lawyer or otherwise and,
- rapid. This aspect obviously depends on the economic resources earmarked for mediation and on the organisation and efficiency of the mediation structure.

These characteristics should not however be the only reason for making recourse to mediation.

II.2. The Council's tendency to: "*facilitate access to justice*" through the preparation of alternative non-contentious procedures which are contractual in nature

In fact, in consideration of objectives established by the Amsterdam Treaty (1997) to improve civil justice and by the Presidency of the European Council (Tampere 1999) to establish non-judicial procedures, as well as the European Council (2000) to create non-contentious settlement instruments, the mediation procedure must be recognised as a new way of conceiving dispute settlement, whereby there are no losers or winners, rather there is a common settlement which is the result of consent between the parties.

II.3. The meaning of the terms "mediation" and "settlement". The role of the "third party".

In addition to the definition given at page 4 of this report, it is worth reiterating that also under the Italian legal order, the word "mediation" means the procedure whereby the parties, assisted by a mediator, attempt to settle a dispute.

The word "settlement" means the result, or rather the mediation agreement.

The role commonly attributed to the mediator is that of facilitating agreement, at times by formulating a proposal for the parties.

II.4. Definitions of "cross-border mediation", "residence" and "domicile".

In general terms, "*cross-border mediation*" means a procedure concerning disputes or collective actions involving consumers from different States.

Article 2 of European Directive 2008/52/EC makes recourse to the

concepts of domicile and habitual residence with respect to at least one of the parties to the procedure. It defines a cross-border dispute as one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen;

(b) mediation is ordered by a court;

(c) an obligation to use mediation arises under national law;

or for the purposes of Article 5

(d) an invitation is made to the parties

Disputes in which a judicial proceeding or arbitration, following mediation between the parties, are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c) are also considered to be cross-border disputes.

The definitions of "residence" and "domicile" are set out under articles 59 and 60 of EU Regulation 44/2001 and for the sake of brevity we will refer to the wording set out below in the footnote.[10]

III. Various types of *cross-border* mediation.

It should primarily be specified that the parties are free, in a mediation clause contained in a contract, to choose not only the place in which they wish mediation to be conducted, but also the law governing that clause. This choice will normally be made. Having said this:

III.1. A first and most frequent case is that in which the parties belong to two different European Union Member States.

In this event, mediation rules are dictated by European Directive 2008/52/EC, which provides under article 5 that the Courts before which an action is brought may invite the parties to use mediation. The Court's jurisdiction will – in this case – be determined in accordance with EC Council Regulation 44/2001. The Court will establish the law applicable to the dispute, in the absence of any choice by the parties, on the basis of rules on conflict applicable in that State.

The same Directive also provides that this is without prejudice to any national legislation specifying that recourse to mediation is mandatory. The right of each party to access the judicial system must not however be prejudiced[11].

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[10] **Reg 44/2001**. **Art. 59** "*In order to determine whether a party is domiciled in the Member State whose courts are seized of a matter, the Court shall apply its internal law. If a party is not domiciled in the Member State whose courts are seized, in order to determine whether a party is domiciled in another Member State, the court shall apply the law of that Member State".*" **Art.60** : *For the purposes of this Regulation a company or other legal person or association of natural or legal persons is domiciled at that place where it has its : statutory seat or, central administration, or principal place of business".*

[11] **In Italy**, the law (no.28/2010) which provides that recourse to mediation is mandatory was declared unconstitutional. On 9 August 2013 however, the Italian Government enacted Decree Law no. 69 of 21 June 2013 which was subsequently converted into law no. 98 9 August 2013 which, commencing from 21 September 2013, reintroduces mandatory mediation prior to commencement of legal proceedings, subject to certain novelties and for specific disputes.

In extreme summary the following have been

In Italy, legislation providing that recourse to mediation is mandatory was declared unconstitutional.

On 9 August 2013, a new law was approved and commencing from 20 September 2013 it reintroduces mandatory mediation prior to commencement of legal proceedings, subject to certain novelties and for specific disputes.

III.2. A second possibility is that the parties are of different nationality but they belong to States of which only one is a European Union Member State.
III.3. A third possibility is that the parties are of different nationality and they belong to States none of which is a European Union Member State.
In both of these events, in view of the fact that recourse to mediation is by means of agreement, the parties may choose the place and the governing law and therefore they will comply with procedural and substantive rules applicable in the chosen State, and the only limit, at least with respect to Italy, is that of public order and mandatory regulations under their respective legal orders.
With respect to the form of any mediation agreements and the possibility of rendering them enforceable, please refer to points VI and VIII below

IV. The language barrier.

IV.1. Choice of language
The choice of a "lingua franca" or of the most suitable language in the specific case.
The choice of mediator also based on the language of the proceedings.
The mediator is a third party asked by the parties to conduct mediation in an efficient, impartial and competent manner. On this basis, the choice of mediator is dictated by the need for persons with legal training and mediation experience and since we are dealing with cross-border mediation, persons who are able to effectively conduct and manage mediation in a language common to the parties or chosen by them.

IV.2 The EEJ-Net
In this regard it is useful to mention the decision by the European Council no. 2001/470/CE that established the EEJ Net in order to render alternative dispute resolution schemes more simple, rapid, effective and less costly. The EEJ Net consists of national "*Clearing Houses*", that can be consulted by the consumer to obtain advice and is useful to mention the decision by the European Council no. 2001/470/CE that established the EEJ assistance in the preparation and presentation of a claim to a Body located in another Member State. In cross-border disputes it is also possible in this way to overcome language barriers and a lack of information regarding the procedures to be followed and the most suitable Mediation Organization Body.[12]

V. Governing law.
The parties will be responsible for choosing the law governing mediation

introduced: **territorial jurisdiction** for the place in which the Court that would have jurisdiction over the case is located; **an obligation to attempt mediation** as a condition to proceeding with a judicial claim regarding condominium matters, real rights, inheritance matters, family agreements, leases, loans for use, lease of a business, medical liability, compensation for damages caused by defamation in the press, insurance, banking and financial agreements; **legal assistance is now mandatory**

[12] A.Pera *Le politiche dell'Unione Europea di accesso alla giustizia e sistemi di ADR*, in Mediazione e Conciliazione cit. pg. 64

proceedings at the following three separate phases:

- upon entering into the contract that contains the mediation clause;
- upon commencing the procedure;
- upon entering into the agreement resulting from mediation, if an agreement has been reached.

Due to the contractual nature of mediation (save for events in which the mediation procedure is mandatory under national law) the parties are free to choose the governing law in all three of the aforementioned phases. It is extremely important for the mediator to be aware of the choice made by the parties in the mediation agreement from the very outset. He must acknowledge this choice by the parties in the mediation agreement and this will affect the possibility of rendering the agreement enforceable in the various States as well as any possibility of challenging that agreement.

- In the absence of a precise choice, the governing law will be established by way of application of provisions relating to contractual obligations under: the Rome Convention, 1 June 1980, with respect to contracts entered into force prior to 17 December 2009, and;
- European Parliament and Council Regulation 593/2008 17 June 2008, which is of universal application and applies irrespective of reference to any States, also outside the European Union, for contracts entered into force following the aforementioned date.

It is well known that the 1980 Rome Convention prefers the law of the Country to which the characteristic obligation under the agreement is the most closely connected, in the absence of any choice. Regulation 593/2008, on the other hand, prefers the law of the place in which the party performing the characteristic service obligation under the contract resides. In case of a mediation agreement, the characteristic service obligation must be identified on the basis of the type of contract.

In case of a mediation agreement entered into by a “consumer” with a party acting in a professional capacity, the governing law will be the law of the place in which the consumer habitually resides, at the terms established by article 6 of the Regulation in question.

VI. Mandatory Italian laws.

VI.1. Form.

The agreement reached during mediation procedures is contractual and its effects are that of establishing, amending or cancelling obligations between the parties. It is equivalent to composition settlement. This agreement must be in writing for the purposes of proof, and must be signed by the parties and by the mediator. It must also be traceable to an “accredited” Mediation Organization Body, i.e. duly enrolled in the Register held by the Ministry of Justice. In case of failure to meet the described requirements, the agreement resulting from mediation will not be approved by the competent Court and cannot therefore be rendered enforceable.

VI.2. Procedure.

Procedural rules are established by the accredited Mediation Organization Body, chosen by the parties, and the appointed mediator must be registered with that Body. Each Body can therefore independently establish its own procedural rules, in order to guarantee real self-government, and may also identify minimum and collective rules thereby avoiding any disparity in the treatment of analogous situations. In *cross-border*

mediation, the choice of a specific mediation organization Body (which may be located in a Member State other than the one in which the parties reside or are domiciled) involves the acceptance of procedural rules applied by the chosen Body and – with respect to the rights subject to mediation – of limits set by each legal order such as unavailable rights, public order, mandatory laws and public decency.\

VI.3. Public order.
This profile is of importance for the purposes of the possibility of rendering the mediation agreement enforceable as well as any challenges to the agreement itself (see paragraph VIII and IX below).

VII. Suspension and/or interruption as a result of the procedure.

VII.1. Suspension or interruption of limitation or prescription periods.
As mentioned above, parties who agree to attempt mediation must be guaranteed the possibility of possible subsequent recourse to ordinary justice (in particular, see "whereas" 24 and article 8 of Directive 2008/52/EC). This involves a need for the national law applicable to the parties or any different national law chosen by the parties upon entering into the mediation clause, to recognise that any application for mediation shall suspend or interrupt any limitation periods (on substantial disputed rights) or however prevent the expiration of any prescription periods. This will allow the parties to bring an action in protection of those rights before the Courts without any risk of adverse party pleading prescription or expiration.

VII.2. Time at which suspension or interruption take place. Time from which the procedure is "pending":
Scholars in this area have formed various theories, all however based on the concept that upon an attempt at mediation, suspension or interruption, as mentioned above, must be recognised; this is necessary in order to guarantee effective protection for the parties.
The majority of legal orders connect the interruption of limitation periods to the commencement of the mediation procedure.
In particular, according to the aforementioned various theories, the suspension or interruption can be connected:

- to the time of consent to commencement of the procedure;
- to the date of filing the application with the Mediation Organization Body;
- to the date of receipt of notice by the other party;
- to the date of "acceptance" by the other party.

The problem arises as to whether mediation conducted in a specific State can result in the suspension or interruption of limitation periods in another State. The solution appears to be identifiable in the choice operated by the parties regarding the governing law applicable to the mediation clause, the procedure and the mediation agreement. The parties will make that choice on the basis of those legal orders that recognise interruption or suspension, as mentioned above, upon commencement of mediation. In the absence of any choice, in view of the contractual nature of mediation, the 1980 Rome Convention and the European Parliament Council Regulation n. 593/2008 17 June 2008 will apply, as stated under paragraph V.).

According to Italian law, a pending dispute and therefore interruption and suspension, are connected to the date of service on the other party of the writ of summons or claim, following which a Court has issued a ruling scheduling a hearing. Analogously, in case of a mediation procedure, the procedure will be held to be pending from the date on which the Mediation Organization Body notifies commencement of the procedure and invites the party to participate. Commencing from that time, the limitation and forfeiture periods are interrupted. However this solution is not upheld by all.

VII.3. Time at which mediation procedure can be held to have concluded.

Parties who have attempted mediation must be informed when the mediation procedure is considered concluded.

a. in case an attempt at mediation has failed, any suspension or interruption of limitation and prescription periods terminates. The limitation and prescription periods recommence from the time at which the mediator officially acknowledged the negative outcome of the procedure. In compliance with the aforementioned terms, each party may then commence proceedings before the competent court. The terms are calculated in accordance with the law chosen by the parties or, where no choice has been made, in accordance with the law applicable pursuant to the Convention and Regulation mentioned under paragraph V.
b. in case mediation is successful, on the other hand, the time at which the procedure can be held to have actually concluded is unclear, also for the purposes of the possibility of rendering the agreement enforceable.
   The alternatives are as follows:
   - the date from which consent by the parties is given, by way of simultaneous signing of the mediation report agreement in the presence of the mediator;
   - the date from which the document (mediation agreement) is filed with the Mediation Organization Body that managed the procedure.
   This second solution appears to be the most supported.

VIII. Effectiveness and enforceability of the mediation agreement.

VIII.1. “Whereas” 19 and 20, article 6, (1 and 2) of Directive 2008/52 and article 40 of Dlgs 5/2003.

Parties that reach a written agreement (as a result of mediation) must be certain that it will be enforceable (in fact, not infrequently the party obligated to perform, refuses to spontaneously perform obligations under the agreement itself).
It is clear that no State can refuse to render a mediation agreement that has been reached before an accredited Mediation Organization Body in a specific State enforceable, unless the content conflicts with the laws of that State, including private international law, and unless that law does not provide for the enforceability of the agreement in question.
An agreement resulting from mediation can be recognised and rendered enforceable in compliance with Council Regulation 44/2001 or, if it concerns marriage and parental responsibility, in compliance with Council Regulation no. 2201, 2003.
Article 6 of the Directive provides for the possibility of requesting enforceability of the content of the agreement with the

express consent of all parties. The only limit is where the content of the agreement conflicts with the law of the State asked or where a specific agreement cannot be made enforceable under the Laws of the State asked.[13]

VIII.2. Effectiveness and enforceability of internal domestic mediation

It is necessary to distinguish between agreements reached through an internal mediation procedure (not included within the scope of application of Directive 2008/52/EC) and agreements reached by way of a *cross-border* mediation procedure (specifically provided by that Directive).

According to Italian legislation (art. 12 Dlgs 28/2010 implementing Directive 58/2008), internal domestic mediation agreements must contain the following in order to be enforceable:

i) a description of the parties' rights and obligations;

ii) the signature of the parties and mediator.

In case of failure to spontaneously enforce the mediation agreement, one of the parties may file an application for enforcement with the President of the Courts for the place in which the Mediation Organization Body that managed the procedure has its headquarters.

Consent from the other party is not required. No terms are established for the application for enforcement.

Upon application by the parties, the President declares the agreement enforceable by way of an *ex parte* order, subject to *prima facie* assessment of the existence of the agreement and of the aforementioned requirements, whilst he will reject an application in case its content violates national public order or mandatory regulations. No reasoning is specifically requested for the enforcement order or for the rejection measure.

An agreement resulting from mediation is a contract. Therefore, even if it has been declared enforceable by the President, it may be challenged on the basis of invalidity (unlawful contract) and annulment (error of law; fraud, incapacity).

Judicial remedies in case of failure to spontaneously enforce the mediation agreement are somewhat weak under the Italian system. It is advisable for the parties to the agreement to provide for the payment of penalties in case of breach or refusal to perform. This specific clause is completely valid under Italian law (art. 11 Dlgs 28/2010).

VIII.3 Effectiveness and enforceability of *cross border* mediation

With respect to *cross border* mediation agreements, article 12 of Dlgs 28/2010 provides that they can be rendered enforceable by the President of the Courts for the place in which enforcement should occur. In this respect, Directive 52/2008 provides that an application for an enforcement order must include consent from the other party. However, Italian doctrine sustains that the Directive allows individual Countries to introduce more favourable rules, on the basis of the principle of national autonomy. The President of the Courts will therefore declare a mediation agreement to be enforceable even if one of the parties alone has made an application. Unlike internal domestic mediation, *cross border* mediation agreements can be rendered

[13] The Italian system also provides for resolution by means of settlement of corporate law, banking and credit and financial intermediation matters (art. 40 of Dlgs 5/2003).

enforceable in Italy, either:

- subject to an enforcement order issued in the State of origin (where mediation took place) through an application to the Italian authority competent for recognition and enforcement, in accordance with Regulation 44/2001 and Regulation 805/2004;
- subject to an enforcement order issued directly in the State in which enforcement must take place. This solution has been adopted in Italy. However, in case the *cross border* mediation agreement can be enforced in various Member States and involves financial obligations, the parties can make recourse to an enforcement order under Regulation 805/2004 (European Enforcement Order).
  Note that article 58 of Regulation 805/2004 in the English version speaks of "*settlements … approved by a Court"*, whilst in the Italian version the expression used is "*settlements reached before a Court*". The European Parliament Commission has decided that article 24 of Regulation 805/2004 and article 58 of Regulation 44/2001 in the French version are compatible, and therefore, they expressly include out-of-court settlements rendered enforceable pursuant to judicial approval (*homologation*).

VIII.4 The enforcement procedure. "In camera" procedure.

The judicial body to whom application for enforcement should be made is indicated by the individual Member States (article 6 paragraph three of Directive 52/2008). In Italy, the application is made to the President of the Courts.

The procedural process for the purpose of obtaining enforcement is divided into the following phases:

- preliminary verification of the capacity of the "accredited" mediation organization Body through which the mediation agreement was reached.
- determination of the Authority competent to render the mediation agreement enforceable.
  In Italy, the Authority competent to issue an enforcement order relating to internal domestic mediation is the President of the Courts for the district in which the Mediation Organization Body is located. For *cross border* mediation the agreement is approved by the President of the Courts for the district in which the agreement must be enforced (article 12 (1) Dlgs 28/2010). An agreement declared enforceable is valid for compulsory expropriation, specific enforcement and for the registration of a statutory mortgage (article 12 (2) Dlgs 28/2010);
- identification of the applicable procedural law: the enforcement procedure is governed by the law of the Member State in which enforcement will occur. Italian law (art. 615 Italian code of civil procedure) provides that the obligor can challenge enforcement disputing "*the right of the applicant party to proceed with compulsory enforcement*". This plea could be raised by the resisting party in order to invoke the invalidity or voidability of the mediation agreement.
  The following are distinguished:
  i. events in which the agreement following mediation has been declared enforceable in the State of origin and the Court that declared it enforceable has reached a decision on whether the agreement was binding on the parties;
  ii. events in which the agreement following mediation has been declared enforceable in the State of origin but the Court that declared it

enforceable has not reached a decision on whether the agreement was binding on the parties

Only in the second of the above events can the plea mentioned above be raised. In the first event, however, the plea is precluded by the decision on the binding nature of the mediation agreement.

It is also provided that the Courts may suspend the enforcement proceedings in case of grave reasons.

- identification of persons entitled to submit an application. As mentioned above, Directive 52/2008 provides that all or one of the parties can, with the express consent of the others, submit an enforcement application. However, in accordance with the national autonomy recognised by the Treaty, Italian law provides that the application can be submitted by one of the parties alone, without the consent of the other party.
- filing of enforcement application with the President's clerk, together with certified copy of the mediation agreement, approved by the competent authority in the State of origin.

IX. Possible challenges.

If it is possible to challenge an enforcement order issued by the President of the Court in Italy it has been asked what are the means and terms for doing so.

There are no obvious specific rules governing this area.

It has been argued (but the opinion is not clear) that it is possible to bring a challenge before the Court of Appeal within the terms established for a challenge to an arbitration award. The matter is however still open to debate and it does not appear that any definitive solutions have been provided.[14]

Gaetano Sardo
Avvocato, Milano, Italy

Investment options in Bulgaria*

After a period of several years of crisis, Bulgaria opens "doors" for foreign investment. A series of government-level measures stimulate the development of projects in several areas. The Bulgarian Investment Agency announces the amount of investments, against which the new projects will receive a grant of hundreds of thousands, as follows:

The Investment Promotion Act (IPA) and the Regulations for Application of the Investment Promotion Act (RAIPA) introduce a system of promotion measures for initial investments in tangible and intangible fixed assets and creating new employment linked thereto, according to the European Commission Regulation (EC) No. 651/2014.

For attainment of Certificate for class Investment (Priority investment project) the following requirements must be fulfilled:

- the investments must be related to the setting-up of a new enterprise, to the extension of an existing enterprise or activity, to diversification of the output of an enterprise or activity into new additional products or to a

[14] R. Matera, *Mediazione e conciliazione* cit., pg. 261 and ff.

fundamental change in the overall production process of an existing enterprise or activity;

- they must be implemented in the following economic activities specified in the Regulations for Application of this Act with the corresponding codes, identified according to the effective Statistical Classification of Economic Activities in the European Community (NACE Rev.2):

a) Industrial sector: Manufacturing industry excluding economic activities under Chapter I, Art. 1, paragraphs 2 and 3 of Regulation № 651/2014;
b) services sector: High technology activities in the field of information technologies and services; software publishing; Accounting and auditing services and tax consultations; Scientific research and development and professional activities of head offices; Human health care and medical social care; Education; Warehousing and support activities for transportation, which includes supporting production activity services (operation of warehouses and transport infrastructure - airports, ports etc.); Administrative and office support activities, activities of call centres and business support activities; Architectural and engineering activities, technical testing and analysis.
c) All economic activities for priority investment projects

Other requirements for the investments:

- at least 80 per cent of the future income must be from the products produced by the economic activities listed above;
- at least 40 per cent of the eligible costs of the investment must be financed by the investor's own or borrowed resources;
- the tangible and intangible fixed assets acquired must be new and purchased at market conditions from third parties independent from the investor;
- the investment must be maintained for at least five years for large enterprises and three years for SMEs, reckoned from the date of implementation of the investment;
- the investment must lead to a net increase in the number of employees in the establishment/organisation concerned, employment must be maintained for at least three years for SMEs and five years for large enterprises.
- the period of implementation must not exceed three years, reckoned from the date of award of an investment class certificate.

Promotion shall not be extended to:

- the investment of any person who has been convicted by an enforceable sentence, unless rehabilitated;
- investment in enterprises experiencing difficulties;
- any investments for the performance of privatisation contracts under the Privatisation and Post-Privatisation Control Act, or for the performance of concession agreements for extraction of natural resources under the Concessions Act , or for extraction of subsurface resources under the

Subsurface Resources Act , and in performance of compensatory (offset) arrangements;
- activities in the coal sector, steel sector, shipbuilding sector, synthetic fibres sector, activities in the fishery;
- activities related to the primary production of agricultural products listed in Annex I to the Treaty establishing the European Community, under Regulation № 651/2014 of the European Commission for the implementation of Art.87 and 88 of the Treaty to national regional investment aid.

Depending on their value and/or the jobs created, investments are divided into classes A, B and Priority investment projects.

The required threshold amount, stipulated in the Regulations for Application of the Investment Promotion Act for Class A and B certificates is as follows (in BGN where fixed rate of 1 Euro is 1,95583 BGN):

In general case of investments within a single establishment in the economic activities of the industrial sector – manufacturing industry:
Class A: BGN 10 million;
Class B: BGN 5 million.
The threshold amount of investments within a single establishment in the economic activities of the services sector as: warehousing and support activities for transportation, office administrative and support activities, activities of call centres and other business support service activities not elsewhere classified:
Class A: BGN 3 million;
Class B: BGN 1.5 million.
Where the initial investment is implemented entirely within the administrative boundaries of municipalities where the rate of unemployment for the year last preceding the current year is equal or higher than the national average, the threshold amount of investments within a single establishment is:
Class A: BGN 4 million;
Class B: BGN 2 million.
The threshold amount of investments within a single establishment in the high technology activities of the industrial sector of the economy is:
Class A: BGN 4 million;
Class B: BGN 2 million.

The threshold amount of investments within a single establishment in the high technology activities and knowledge based activities of the services sector is:
Class A: BGN 2 million;
Class B: BGN 1 million.

The biggest stimulations are for Priority investment projects. Such are investment projects which concern all sectors of the economy according to the requirements of Regulation (EC) No 651/2014 and are particularly important for the economic development of the Republic of Bulgaria or for the functional regions in Bulgaria.

The certificate determines the investment class and the rights of the investor under the law.
According to the measures established by the Investment Promotion Act, investments are promoted through:

1. shorter term for administrative services: Class A and B;
2. individual administrative services for implementation of the investment project: Class A;
3. sale or establishing, against a consideration of limited real rights of private state or private municipal

immovable property, without conduct of an auction or a competitive bidding procedure: Class A and B;
4. sale, exchange of property or establishing, against a consideration, of limited real rights over immovable of Sole proprietor companies with state or municipal participation, as well as commercial companies, whose capital is owned by sole proprietor companies with state participation without a tender procedure or competitive bidding, at market or lower price Class A and B;
5. financial support for construction of physical infrastructure elements needed for the implementation of one or more investment projects: Class A or two or more certified investment projects implemented within the territory of an industrial zone, based on competitive procedure for evaluation and selection of investment projects;
6. Financial support for vocational training for attainment of professional qualification by the hired staff, including interns from the higher schools in Bulgaria, who have occupied the new jobs created upon implementation of the investment project (only for investments in municipalities with high unemployment rate or in the field of Hi tech activities): Class A and B, based on the competitive procedure for evaluation and selection of investment projects;
7. financial support for partial reimbursement of the contributions made by the investor for obligatory state social insurance, supplementary pension insurance and mandatory health insurance for newly hired employees for the implementation of the project: Class A and B, based on the competitive procedure.

Under the Investment Promotion Act (IPA), the certified priority investment projects may be promoted by the package of measures – all the measures that apply for class A and B plus the following:
1. Sale or establishing, against a consideration, of limited real rights over immovable - private state or private municipal property without a tender procedure or competitive bidding, at market or lower price but not lower than the tax assessment of the property and no state fees shall be paid in the event of changing the land use for the purposes of implementation of the project;
2. Sale, exchange of property or establishing, against a consideration, of limited real rights over immovable of Sole proprietor companies with state or municipal participation, as well as commercial companies, whose capital is owned by sole proprietor companies with state participation without a tender procedure or competitive bidding, at market or lower price, but not lower than the tax assessment of the property;
3. institutional support or public-private partnership;
4. providing grant financial aid n the following cases and under the following conditions:
a) up to 50 % maximum aid intensity for investments in education and scientific research (Codes P 85 and M 72 according to NACE Rev.2), where at least 25 % of the threshold amount of the investment implemented up to the third year from the start of the works / activities under the investment project;
b) up to 10 % maximum aid intensity for investments in the manufacturing industry where at least 50 percent of the threshold amount of the investment is implemented up to the third year from the start of the works / activities under the investment project.
Promotion measures under the IPA apply

only to investors who have received an investment class certificate or certificate for priority investment projects. The certification requirements for the investment project are provided in the Regulations for Application of the Investment Promotion Act.

Where the investment project plans to create and maintain full time jobs, the threshold amounts for the Investments are decreased. Additional information for the investment options in Bulgaria can be provided free of charge by request on s.dimitrova@dplaw.bg

Svilena Dimitrova
D&P Law Office Bulgaria

***With the support of BIA**

SAPIN II
The new French law against corruption

La loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique consacre 33 de ses premiers articles au problème des manquements à la probité et dont la corruption est un élément central.
1 – Dans un chapitre 1er (Art. 1 à 5) – la loi fonde une Agence nationale française anticorruption comprenant en son sein une commission des sanctions – Cette Agence devrait compter 70 personnes (contre 16 actuellement mobilisées au ministère de la justice) et pourra sanctionner les défaillances des 1600 entreprises concernées en France (entreprises de plus de 500 salariés et dont le CA dépasse 100 millions (art. 17 – I 2°). L'Agence pourra infliger des amendes allant jusqu'à 1 millions d'euros pour les sociétés et jusqu'à 200.000 € pour les personnes physiques (art. 17 – V).
2 – Art. 6 à 16 - Définissent et organisent la protection des lanceurs d'alerte.

Art. 6 - « Le lanceur d'alerte est une personne physique qui relève ou signale, de manière désintéressée et de bonne foi, un crime ou un délit, une violation grave et manifeste d'un engagement international régulièrement ratifié ou approuvé par la France (…) ou une menace ou un préjudice grave pour l'intérêt général, dont elle a eu personnellement connaissance ».
La loi vient trop tard pour Mme Irène Frachon ayant dénoncé a ses risques le danger sanitaire du Médiator.
La loi prévoit notamment de sanctionner ceux qui font obstacle, (..) à la transmission d'un signalement aux personnes et organismes mentionnés dans la loi (Art.8).

Art. 8 décrit les procédures d'un signalement direct ou indirect d'une alerte et l'art.9 leur garantie le bénéfice de la confidentialité assorti de sanctions pour le cas de violation.

L'art. 10 modifie les dispositions du Code du travail de manière à protéger les salariés ayant signalé une alerte dans le respect des articles 6 à 8 de la loi.

L'art. 11 étend la protection des lanceurs d'alerte dans le cadre de l'administration et l'art. 12 permet au salarié de saisir le conseil de Prud'hommes en cas de rupture d'un contrat de travail consécutif au signalement d'une alerte.

Art. 16 – Il s'agit là de dispositions particulières de protection des salariés dans les cas de signalement par eux de

bonne foi à l'Autorité des marchés financiers ou à l'Autorité de contrôle prudentiel (..) de fait susceptible de caractériser des manquements mentionnés à l'article 634-1 (prévoyant la mise en place de procédure de signalement des manquements aux règlements européens et au règlement général de l'autorité des marchés financiers.

Art. 17 – Celui-ci crée une obligation pour les entreprises privées et publiques de plus de 500 salariés et d'un chiffre d'affaires de plus de 100 millions d'euros de devoir mettre en place toute une série de moyen de lutte anti-corruption :
1° un code de conduite définissant les comportements à proscrire.
2° un dispositif d'alerte interne pour recueillir les signalements
3° une cartographie des risques en fonction des secteurs d'activités et des zone géographiques
4° Des procédures d'évaluation de la situation des clients, fournisseurs et intermédiaires.
5° Des procédures de contrôles comptables pour s'assurer que les comptes ne masquent pas des faits de corruption
6° Un dispositif de formation destiné aux cadres et aux personnels les plus exposées
7 ° un régime disciplinaire pour sanctionner les salariés en cas de violation du code de conduite.
8° Un dispositif de contrôle et d'évaluation interne des mesures prises.
S'agissant des sanctions : Le montant prévu ne peut excéder 200.000 € pour les personnes physiques et un million d' € pour les personnes morales.

Art.18 – Crée une peine nouvelle dans le code pénal (art. 131- 39—2) aux fins de contraindre les entreprises condamnées à se soumettre à certaines obligations sous le contrôle de l'agence française anticorruption pour une durée maximale de cinq ans.

Art.19 – Prévoit une peine d'inéligibilité à des fonctions publiques pour les personnes condamnées pour des faits de corruption.

Art.20 – Modifie le code pénal (Art. 435-2) et prévoit une infraction particulière s'agissant de la corruption d'agent public d'un état étranger.

Art.21 – Prévoit l'extension à l'étranger du champ d'application des infractions en matière de corruption. Pour la personne coupable sur le territoire français comme complice d'une infraction commise à l'étranger, la condition de constatation de l'infraction par une décision définitive de la juridiction étrangère n'est pas applicable.

Art.22 - Dans le cas d'une personne morale mise en cause pour un ou plusieurs délits relevant de corruption, cet article prévoit la possibilité de conclure une convention judiciaire d'intérêt public, pour autant que l'action publique n'a pas été mise en mouvement. (« deferred prosecution agreement »). Cet article qui n'est pas encore en exécution conduirait les entreprises concernées à payer une amende au lieu d'une condamnation pénale.

Art. 25 à 33 – Sous le titre « De la transparence des rapports entre les représentants d'intérêt de les pouvoirs publics » ces articles prévoient notamment la création d'un répertoire public numérique pour assurer l'information des citoyens sur les relations entre les représentants d'intérêts (notamment les

lobbies) et les pouvoirs publics.

Les mesures prévues seront utilement complétées par le travail de la Haute Autorité pour la Transparence de la Vie Publique (HATVP) crée en 2003 et opérationnelle depuis 2014. Cette institution dont la principale mission est de promouvoir une culture de l'intégrité publique devra vérifier à partir de juillet 2017 le registre des représentants d'intérêts (lobbies).

The Panama Papers (June 2016) with 150 inquiries within 79 states has shown the abyssal height of tax evasion closely linked to corruption operations.
According to the European Commission, corruption within the 28 countries of the EU cost about 120 billions to our economies.
By the end of 2016 the OCDE expressed its concern for none dissuasive attitude among the members states.
Concerning the offshore economy – depriving state of huge ressources and endangering democracies – OXFAM report 25.03.2017 (a non government organisation) shows that 20 of the major banks from the EU (among them BNP Paribas, Deutsche Bank, HSBC, Société Générale, Santander, Intessa etc..) uses the offshore banks to invest their benefits 25 billions € meaning 26 % of their benefits are registered in some offshore paradis (while only 7% of their employees are registered in these places).
In such environment the new legal anti-corruption measures Sapin II dated 9 December 2016 (applicable after 11.06.17) intends to encounter the corruption issue.

This law which applies in France to companies (private and public) having more than 500 employees and a turn over superior to 100 millions euro the new rules provides :

- **The setting of a national anti-corruption agency**
- **The issuing of new offenses and penalties**
- **Obligations set on companies and senior managers to prevent corruption**
- **Protection measures for whistleblowers**

Leonard Goodenough
Avocat au barreau de Paris

Eigenhaftung und Organisationsverantwortung des Geschäftsführers von Kapitalgesellschaften

Teil I
Haftung im Innenverhältnis und Durchgriffshaftung von Gläubigern

Im Zuge der Entwicklung der Rechtsprechung des höchsten deutschen Gerichts in zivil-rechtlichen Angelegenheiten, dem Bundesgerichtshof (BGH), in den letzten Jahren und Jahrzehnten hat die Durchgriffshaftung von Gläubigern auf Geschäftsführer bzw. Geschäftsführungsorganen von juristischen Personen, insbesondere Kapitalgesellschaften, ständig neue Gesichter bekommen. Jeder Geschäftsführer einer GmbH wie auch der Vorstand und ggf. der Aufsichtsrat einer

Aktiengesellschaft muss sich heute stets vor Augen halten, dass sein Tun und Lassen innerhalb seiner Aufgabenstellung in dem Unternehmen stets die Gefahr einer persönlichen Haftung mit sich bringt. Zu unterscheiden ist dabei zum einen die Haftung der verantwortlichen Geschäftsführungsorgane gegenüber der Gesellschaft selbst und zum anderen die Haftung der handelnden bzw. verantwortlichen Geschäftsführer gegenüber außenstehenden Dritten, insbesondere Gläubigern der jeweiligen Gesellschaft.

1. Haftung des Geschäftsführers im Innenverhältnis zur Gesellschaft

Hier gelten im Wesentlichen noch die alten Grundsätze, die die Rechtsprechung schon seit Jahren entwickelt hat. Die Geschäftsführer einer GmbH haben in den Angelegenheiten der Gesellschaft die Sorgfalt eines ordentlichen Kaufmannes anzuwenden; Gleiches gilt für Vorstandsmitglieder einer Aktiengesellschaft (§ 43 Abs. 1 GmbHG, § 93 Abs. 1 S. 1 AktG). Verletzen sie ihre Obliegenheiten und Pflichten, haften sie der Gesellschaft solidarisch für den entstandenen Schaden. Die hierin begründete allgemeine Sorgfaltspflicht des Geschäftsführers führt letztendlich auch dazu, dass der Geschäftsführer bzw. die Geschäftsführungsorgane Verantwortung dafür tragen, dass organisatorische Vorkehrungen getroffen und Kontrollmechanismen eingerichtet und etabliert werden müssen, so dass sich aus der allgemeinen Sorgfalts- und Legalitätspflicht auch eine Organisations- und Überwachungsverantwortung der jeweiligen Geschäftsführungsorgane ergibt. Unterlassungen in diesem Bereich, führen zu Haftungsansprüchen der Gesellschaft gegen ihre Organe selbst.

2. Haftung des Geschäftsführers/ Geschäftsführungsorgane gegenüber außenstehenden Dritten

In zahlreichen Fallkonstellationen nimmt der BGH bei Haftungstatbeständen, in denen die Gesellschaft dem außenstehenden Gläubiger Schadensersatz zu leisten hat, neben der Haftung der Gesellschaft auch eine Haftung des verantwortlichen Geschäftsführers bzw. des verantwortlichen Geschäftsführungsorgans an.

Entscheidend ist dabei, ob die konkrete Pflichtverletzung in den Aufgabenbereich der Geschäftsführung fällt, so dass man ihr hier entweder ein rechtswidriges Tun oder ein ebenfalls rechtswidriges, weil pflichtwidriges, Unterlassen vorwerfen kann. Auch hier wird die Frage der zutreffenden organisatorischen Vorkehrungen innerhalb einer Gesellschaft wichtig. Trifft die Geschäftsführung der Vorwurf, Organisations- und Kontrollpflichten nicht sorgfältig installiert und überwacht zu haben, so kann dies bereits zu einer Durchgriffshaftung auf den Geschäftsführer führen.

Beispielsweise wurde ein Geschäftsführer einer GmbH wegen Verletzung eines Eigentumsvorbehaltsrechts seines Lieferanten zu Schadensersatz verurteilt, da er nicht verhindert hatte, dass aufgrund fehlerhafter Allgemeiner Geschäftsbedingungen dieser Eigentumsvorbehalt an den Auftragnehmer der Gesellschaft beim dortigen Einbau der Materialien nicht verlorenging (vgl. BGH Urteil vom 05.12.1989 – VI ZR 335/88). Hier kam der BGH zu dem Schluss, dass die Vermeidung einer derartigen Situation eine organisatorische Aufgabe der Geschäftsführung gewesen sei, der

offensichtlich nicht ordnungsgemäß nachgekommen wurde. Dies bedeutet aber auch, dass der BGH davon ausgeht, dass die Organisationspflicht nicht erst im konkreten Einzelfall besteht, sondern bereits vorher alleine durch die Teilnahme am allgemeinen Rechtsverkehr.

Ansonsten ist die Rechtsprechung durchaus nicht ganz klar und einheitlich. Zunächst sind sich alle Zivilsenate des BGH noch einig, dass die bloße Organstellung für sich genommen (noch) keine Garantenpflicht gegenüber einem Dritten begründet, eine Schädigung dessen Vermögen unbedingt zu verhindern. Doch zeigen sich bei der Frage, wann eine derartige Garantenpflicht der Geschäftsführung ‚über die Organstellung hinaus' entstehen kann, einige, in der Praxis durchaus wichtige Unterschiede zwischen den einzelnen Senaten des BGH. So neigen wohl der VI. als auch der X. Zivilsenat eher generalisierend dazu, aus der Zuständigkeit des Geschäftsführers bzw. Vorstands seine persönliche Verantwortung abzuleiten, während sich der 1. Zivilsenat zunehmend auf die Rechtsverletzungen konzentrierte, die durch Sachverhalte verursacht werden, über die typischerweise (ausschließlich) auf der Geschäftsführungsebene entschieden wird. Hierzu zählten in der Praxis beispielsweise der Werbe- einschließlich des Internetauftritts eines Unternehmens (BGH, Urteil vom 30.06.2011, I ZR 157/10) oder auch die Frage, ob und inwieweit von der Gesellschaft hergestellte und vertriebene Produkte im Ausland vertrieben und beworben werden sollen bzw. dürfen (BGH Urteil vom 05.11.2015 I ZR 76/11). Dieser Katalog ist natürlich fast unendlich auszuweiten und schafft bei den Untergerichten großen Entscheidungs- spielraum. Zum Beispiel gehören auch Presseerklärungen zur typischen Verantwortlichkeit einer Geschäftsführung (BGH Urteil vom 17.08.2011, I ZR 108/09), was nach hiesiger Auffassung - je nach Inhalt der Presseerklärung - auch für Großunternehmen mit eigener Presseabteilung und delegierten Verantwortlichkeiten gelten kann.

Zusammenfassend lässt sich jedenfalls feststellen, dass alle Zivilsenate für das Wettbewerbsrecht, das Urheberrecht und auch das Patentrecht im Wesentlichen die Auffassung vertreten, dass diese Bereiche zum originären Aufgabenbereich der Geschäftsführung zählen, so dass diesbezügliche Verstöße des Unternehmens in diesen Bereichen in aller Regel eine persönliche Haftung des Geschäftsführers bzw. der Geschäftsführungsorgane auslösen. Gleiches dürfte mittlerweile auch für das Markenrecht gelten. Dies bedeutet letztendlich, dass bei bestimmten Rechtsgebieten von Beginn an die Gefahr bestehen kann, dass bei einer Rechtsverletzung in diesen Bereichen eine persönliche Haftung droht.

Dies bedeutet in der Praxis, dass die Geschäftsführung bei Themen wie zum Beispiel

- dem Werbe- und/ oder Internetauftritt eines Unternehmens,
- der Entscheidung zur Herstellung und des Vertriebs von Produkten,
- der Internationalisierung des Vertriebs,
- der Produktgestaltung u.v.m.

die notwendige Sensibilität zu entwickeln

hat und zu erkennen, dass Entscheidungen in diesen Bereichen typische Gefährdungslagen schaffen können.

„Piercing the corporate veil“ - Personal liability and organizational responsibility of the management of corporations. Looking at the jurisdiction of the German Federal Court each member of the management of German companies has to be sensitive, if decisions have to be made in special business sectors and/ or typical decisions of a management in a company.

Teil II dieses Artikels, der die Haftung von Geschäftsführern und Vorständen im Rahmen von Straf- und Bußgeldbescheiden und zwar insbesondere im Außenwirtschafts- und Zollrecht erörtert, erscheint im ULN Law Review 2/ 2017.

Nicolas Meyer, Rechtsanwalt
Michail Burgesmeir, Assessor,
Cologne, Germany

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Authors:

Gaetano Sardo, Avvocato,
Via Falcone 5, 20123 Milano Italy
E-Mail: gaetanosardo@studiolegalesardo.it

Svilena Dimitrova, Attorney-at-law,
85, Tsar Boris III Blvd., 1612 Sofia, Bulgaria
E-Mail: s.dimitrova@dplaw.bg

Leonard Goodenough, Avocat á la Cour,
5, Rue Taylor, 75010 Paris, France
E-Mail: leonard.goodenough@avocat-taylor.com

Nicolas Meyer, Rechtsanwalt
Hohenstaufenring 63, 50674 Köln/Cologne
E-Mail: info@meyer-cologne.de