Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

27 June 2013*

(Judicial cooperation in civil matters — Mediation in civil and commercial matters — Directive 2008/52/EC — National legislation providing for a compulsory mediation procedure — No need to adjudicate)

In Case C-492/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Giudice di pace di Mercato San Severino (Italy), made by decision of 21 September 2011, received at the Court on 26 September 2011, in the proceedings

Ciro Di Donna

v

Società imballaggi metallici Salerno srl (SIMSA),

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh, C. Toader (Rapporteur) and C. G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

— the French Government, by G. de Bergues and J.-S. Pilczer, acting as Agents,

— the Austrian Government, par A. Posch, acting as Agent,

— the European Commission, by F. Moro and M. Wilderspin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 April 2013,

gives the following

* Language of the case: Italian.

Judgment

1 The request for a preliminary ruling concerns the interpretation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ 2008 L 136, p. 3), Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, and Article 47 of the Charter of Fundamental Rights of the European Union.

2 This request has been made in proceedings between Mr Di Donna and the Società imballaggi metallici Salerno (SIMSA) srl ('SIMSA') concerning compensation for the damage caused to his motor vehicle and in respect of which the Giudice di pace di Mercato San Severino intends to apply the compulsory mediation procedure provided for under Italian law.

Legal context

European Union legislation

3 Recitals 8 and 10 in the preamble to Directive 2008/48 are worded as follows:

'(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

…

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. ...'

4 Article 1(1) of Directive 2008/52/EC provides:

'The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.'

5 Article 3(a) of Directive 2008/52/EC states:

'… the following definitions shall apply:

(a) "Mediation" means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

…'

6 Article 5(2) of Directive 2008/52 provides:

‘This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.’

7 Article 7(1) of Directive 2008/52 is worded as follows:

‘Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person: or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

…’

Italian law

Legislative Decree No 28/2010

8 Legislative Decree No 28 of 4 March 2010 implementing Article 60 of Law No 69 of 18 June 2009 on mediation for the purposes of conciliation in civil and commercial litigation (GURI No 53 of 5 March 2010; ‘Legislative Decree No 28/2010’) was communicated to the European Commission as a national measure implementing Directive 2008/52.

9 Article 5(1) of Legislative Decree No 28/2010 provides:

‘Any person who intends to bring legal proceedings concerning a dispute over joint ownership, property rights, division, inheritance rights, family contracts, leases, loans-for-use, leases of businesses, compensation for damage resulting from vehicle and boat traffic, medical liability and defamation through the press and other media, or insurance, banking and financial contracts, shall be required, as a preliminary step, to use mediation within the meaning of the present decree … The carrying out of mediation shall be a precondition for bringing legal proceedings. Any objection of inadmissibility on this ground must be raised by the defendant, failing which it shall be barred, or may be raised by the court of its own motion, before the conclusion of the first hearing. Where a court finds that mediation has been initiated but not concluded, it shall fix a further hearing after the period referred to in Article 6 has expired. It shall do likewise where mediation has not been initiated, granting the parties, at the same time, a period of 15 days within which to submit the request for mediation.’

10 Article 6 of Legislative Decree No 28/2010 reads as follows:

‘1. A mediation procedure shall last no longer than four months.

…’

11 Article 8 of Legislative Decree No 28/2010, as amended by Law No 148 of 14 September 2011 (GURI No 216 of 16 September 2011, p. 1), governs the carrying out of the mediation procedure. That article lays down as follows:

‘1. On submission of a request for mediation, the person responsible within the relevant body shall designate a mediator and shall arrange a first meeting between the parties within 15 days of the submission of the request. …

…’

12 Article 11 of Legislative Decree No 28/2010 states:

‘1. Where an amicable settlement has been reached, the mediator shall draw up a record to which the text of the agreement shall be annexed. Where no agreement is reached, the mediator may draw up a proposal for conciliation. In any event, the mediator shall draw up a proposal for conciliation where the parties make a joint request for him to do so at any point during the mediation process. Before drawing up the proposal, the mediator shall inform the parties of the possible consequences referred to in Article 13.

...

4. Where the attempt at conciliation is unsuccessful, the mediator shall draw up a report setting out the proposal, which shall be signed by the parties and by the mediator, who shall certify the signatures of the parties so signing, or their inability to sign. The mediator shall also mention in his report the failure of any party to participate in the mediation.’

13 Article 13 of Legislative Decree No 28/2010, concerning the costs of the procedure, provides:

‘1. Where the order made in the judgment concluding the proceedings corresponds entirely to the content of the proposal, the court shall disallow recovery of the costs incurred by the successful party who has rejected the proposal, in respect of the period following the drawing up of the proposal, and order that party to reimburse the costs incurred by the unsuccessful party in respect of that period and also to pay to the State treasury a further sum equal to the single payment due. Articles 92 and 96 of the Code of Civil Procedure [Codice di procedura civile] continue to apply. The provisions of this paragraph shall also apply to the remuneration paid to the mediator and to the fees of any expert as referred to in Article 8(4).

2. Where the order made in the judgment concluding the proceedings does not correspond entirely to the content of the proposal, the court may, if there are serious and exceptional reasons for doing so, none the less disallow recovery of the costs incurred by the successful party in respect of the remuneration paid to the mediator and the fees of any expert as referred to in Article 8(4).’

Ministerial Decree No 180/2010

14 By legislative act, the Italian Government adopted Ministerial Decree No 180 of 18 October 2010, as amended by Ministerial Decree No 145 of 6 July 2011 (‘Ministerial Decree No 180/2010’). For the purposes of the present case, Article 16 of Ministerial Decree No 180/2010 provides:

‘1. The fees shall include the cost of initiating the mediation procedure and the costs of the mediation.

2. A mediation initiation cost of EUR 40, which is part of the overall fee, shall be paid by each party requesting the mediation on lodging an application for mediation, and by any other party who joins mediation when joining that procedure.

3. Each party shall be liable to pay the costs of the mediation as set out in Table A annexed to this decree.

4. The maximum costs of mediation for each reference category, as set out in Table A:

(a) may be increased by up to one-fifth to take account of the particular importance, complexity or difficulty of the matter;

(b) shall be increased by up to one-quarter in the event of a successful outcome to the mediation;

(c) shall be increased by one-fifth in the event that a proposal is formulated within the meaning of Article 11 of Legislative Decree [No 28/2010];

(d) as regards the matters referred to in Article 5(1) of Legislative Decree [No 28/2010], shall be reduced by one-third for the first six categories and by half for the remaining categories, without prejudice to the reduction contemplated under point (e) of the present paragraph, and no other increase provided for in the present article shall be applied except for that referred to in point (b) of the present paragraph;

(e) shall be reduced to EUR 40 for the first category and EUR 50 for all other categories, without prejudice to the application of point (c) of the present paragraph, when none of the opponents of the party who has requested the mediation participates in the mediation procedure.

…

14. The minimum fee amounts indicated for each of the reference categories as set out in Table A annexed to this decree may be varied.'

15 Table A, referred to in Article 16(4) of Ministerial Decree No 180/2010, states as follows:

Value of the claim	Costs (for each party)
Up to € 1 000	€ 65
From € 1 001 to € 5 000	€ 130
From € 5 001 to € 10 000	€ 240
From € 10 001 to € 25 000	€ 360
From € 25 001 to € 50 000	€ 600
From € 50 001 to € 250 000	€1 000
From € 250 001 to € 500 000	€2 000
From € 500 001 to € 2 500 000	€3 800
From € 2 500 001 to € 5 000 000	€5 200
Over € 5 000 000	€9 200

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 Mr Di Donna instituted legal proceedings against SIMSA seeking compensation from it for the damage caused to his motor vehicle by a fork-lift truck belonging to that company. According to the file, SIMSA did not contest the facts but requested that the first hearing be adjourned so that the insurance company with which it has a policy insuring covering it for delictual liability could be

joined in the proceedings. It however argued, in that regard, that it was necessary, before that insurance company could be joined in proceedings, to submit the case to the compulsory mediation procedure provided for under Legislative Decree No 28/2010.

17 The referring court considers that that decree is applicable to the facts in the main proceedings to the extent that the contractual link between SIMSA and the insurance company called upon to join the proceedings falls within the scope of insurance matters for which the mediation procedure is, applying Article 5(1) of that decree, compulsory and in the absence of which any court action will be rendered inadmissible. The Giudice di pace di Mercato San Severino nevertheless raises the question whether, for the purposes of fixing the date of the next hearing, it is necessary to take into account the 45-day period allowed for the insurance company to submit to the court's jurisdiction or also the four-month period necessary for the attempt at mediation. In addition, the referring court shares SIMSA's doubts concerning the compatibility of the provisions of Legislative Decree No 28/2010 with European Union law.

18 It was in that context that the Giudice di pace di Mercato San Severino decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'Do Articles 6 and 13 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Article 47 of the Charter of Fundamental Rights of the European Union …, Directive 2008/52/EC …, the general European Union law principle of effective judicial protection and, in general, European Union law as a whole preclude the introduction in a Member State of the European Union of a set of rules [such as] Legislative Decree No 28/2010 and Ministerial Decree No 180/2010 … which provide that:

1. a court hearing subsequent legal proceedings may infer evidence against a party who, without valid reason, has failed to participate in compulsory mediation;

2. where legal proceedings brought after the rejection of a conciliation proposal are concluded by a judgment in precisely the same terms as those of the rejected proposal, the court must disallow recovery of the costs sustained by a successful party who rejected the conciliation proposal in respect of the period following the making of the proposal and must order that party to pay the costs of the unsuccessful party in respect of the same period and to make a further payment to the State treasury in the same amount as that already paid in respect of fees (single payment);

3. where there are serious and exceptional reasons, a court may disallow recovery of the costs incurred by the successful party in respect of the remuneration paid to the mediator and the fees of any expert, even where the judgment concluding legal proceedings is not in exactly the same terms as those of the conciliation proposal;

4. the court must order any party who has failed without valid reason to participate in mediation to pay to the State treasury a sum equal to the single payment in respect of the proceedings;

5. the mediator may, or must, make a proposal for conciliation even in the absence of any agreement between the parties and even where the parties fail to participate in mediation;

6. the period within which the attempt at mediation must be completed may be up to four months;

7. an action may be proceeded with, even after expiry of the period of four months from the commencement of the mediation procedure, only after a report confirming that no agreement has been reached has been obtained from the secretariat of the mediation body concerned, drafted by the mediator and setting out the proposal that has been rejected;

8. there may be more than one attempt at mediation – and the period allowed for resolving the dispute will be multiplied accordingly – whenever a new application is legitimately made in the course of legal proceedings that have, in the meantime, been instituted;

9. the costs of compulsory mediation are at least twice those of the legal proceedings that mediation is designed to avoid, a disparity which increases exponentially as the amount involved in the case increases (to such an extent that the costs of mediation may reach more than six times those of legal proceedings) and the complexity of the case increases (such as to require the appointment of an expert, paid by the parties to the mediation, to assist the mediator in disputes that call for specific technical knowledge, even though any technical report prepared by the expert [or] the information he has obtained may not be used in any subsequent legal proceedings)?'

Developments since the making of the request for a preliminary ruling

19 Following a request for clarification by the Court of the grounds justifying the necessity of the present request for a preliminary ruling in order to decide the case in the main proceedings, the referring court, in its reply of 9 March 2012, stated that, were the Court to decide that the national legislation was incompatible with European Union law, it would be obliged not to refer the dispute in the main proceedings to mediation, with consequences for the calculation of the time-limits applicable to the fixing of the hearing.

20 By judgment No 272/2012, delivered on 24 October 2012, the Corte costituzionale (Constitutional Court) declared certain articles of Decree No 28/2010 unconstitutional, including Articles 5(1), 8(5) and 13, with the exception, regarding the latter article, of the reference to Articles 92 and 96 of the Italian Code of Civil Procedure, which are however irrelevant to the case in the main proceedings.

21 It follows from that judgment, inter alia, that, following the finding that Article 5(1) of Legislative Decree No 28/2010 is unconstitutional, the prior initiation of mediation in Italy is no longer a precondition for the admissibility of legal proceedings and the parties are henceforth no longer bound to resort to mediation.

22 By letter of 14 December 2012, the Registry of the Court requested the referring court to inform it of the consequences of judgment No 272/2012, both on the national proceedings pending before it and on the request for a preliminary ruling.

23 By letter of 17 January 2013, that court replied that it would maintain its request for a preliminary ruling but it did not take a position on the bearing of that judgment on the decision in the main proceedings or on the relevance of the questions referred to the Court for a preliminary ruling.

Consideration of the request for a preliminary ruling

24 According to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of European Union law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59; Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; and Case C-241/09 *Fluxys* [2010] ECR I-12773, paragraph 28).

25 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court in order to establish whether it has jurisdiction. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of European Union law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, in particular, *PreussenElektra*, paragraph 39; Case C-544/07 *Rüffler* [2009] ECR I-3389, paragraph 38; Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraph 42; and Case C-399/11 *Melloni* [2013] ECR, paragraph 29).

26 Thus, on the basis of settled case-law, it is clear from both the wording and the scheme of Article 267 TFEU that a national court or tribunal is not empowered to bring a matter before the Court by way of a reference for a preliminary ruling unless a case is pending before it, in which it is called upon to give a decision which is capable of taking account of the preliminary ruling (see to that effect, inter alia, Case C-225/02 *García Blanco* [2005] ECR I-523, paragraph 27 and case-law cited).

27 In the case in the main proceedings, following the judgment of the Corte costituzionale of 24 October 2012, the national legislation applicable to the dispute in the main proceedings is no longer that under consideration in the context of the request for a preliminary ruling (see, by analogy, *Fluxys*, paragraph 32). That judgment, declaring some of the provisions of Decree No 28/2010 incompatible with the constitution, has the effect of removing them from the national legal system.

28 While the referring court, in its letter of 17 January 2013, admittedly stated that it wished to maintain its request for a preliminary ruling, it did not however indicate in what way the questions referred by it remained relevant for the decision in the main proceedings.

29 As stated by the Advocate General in points 20 and 23 of her Opinion, the nine questions referred to the Court have now become hypothetical.

30 The first four questions refer to the compatibility with European Union law of national legislation which entitles the court, first, to infer evidence against a party who, without valid reason, has failed to participate in compulsory mediation and to order any party who has failed without valid reason to participate in mediation to pay to the State treasury a sum equal to the single payment payable in respect of the costs (Article 8(5) of Legislative Decree No 28/2010) and, second, to disallow recovery of the costs sustained by a successful party who rejected the conciliation proposal and to order that party to pay the costs of mediation (Article 13 of that decree). Thus, those questions refer exclusively to provisions which were declared unconstitutional. Accordingly, those questions have become devoid of purpose as a result of the changes which have occurred concerning the applicability of the national legislative provisions.

31 With regard to the final five questions concerning the carrying out of the mediation procedure, the time-limits for the procedure and its cost, it must be observed, as stated in paragraph 27 above, that the national legal context of the dispute in the main proceedings is no longer that described by the national court in its order for reference. Following the finding that Article 5(1) of Legislative Decree No 28/2010 is unconstitutional, the parties are henceforth no longer bound to participate in mediation. Consequently, as stated by the Advocate General in point 29 of her Opinion, those questions are no longer of any relevance for the purposes of the decision in the main proceedings.

32 It follows that, taking into account the development of the dispute before the referring court from the point of view of the applicable law, the Court is no longer in a position to give a ruling on the questions which have been referred to it (see, to that effect, *Fluxys*, paragraph 34).

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

There is no need to answer the question referred by the Giudice di pace di Mercato San Severino (Italy) by decision of 21 September 2011 for a preliminary ruling in Case C-492/11.

[Signatures]