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MEDIATING COMMERCIAL DISPUTES: HOT TOPICS AND PRACTICAL TIPS

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National Report of Italy

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Forewords

Directive 2008/52/EC of the European Parliament and of the Council of May 21, 2008 on certain aspects of mediation in civil and commercial matters (henceforth, "**Mediation Directive**") was enacted in Italy by Legislative Decree dated March 4, 2010, no. 28 (henceforth, the "**Mediation Act**"). This piece of legislation was issued by the Italian Government, which was delegated by the Italian Parliament to draft the legal text ruling thereon, and it was subsequently amended by Decree-Law dated June 21, 2013, n. 69 (passed by Law dated August 9, 2013, no. 98).

Mediation Procedure

1. What is the typical mediation procedure in your country?

The Mediation Act provides for a set of rules on the mediation in civil and commercial matters on rights on which parties may dispose.

It rules three different kinds of mediation. Firstly, it generally rules the mediation as a voluntary and spontaneous dispute resolution method, other than litigation.

Secondly, it provides for a mandatory mediation that parties should join before bringing legal proceedings concerning a dispute over certain specific matters in court[1]. Carrying out a mediation is a precondition for bringing legal proceedings, notwithstanding the value of the case, on matters on which parties tend to take legal actions and thus characterized by high level of litigiousness, such as:

a. Banking contracts (in 2014, 25.1%);

b. Property rights (in 2014, 13.1%);

c. Lease (in 2014, 11.6%);

d. Joint ownership rights (in 2014, 10.7%);

e. Compensation for damages resulting from medical liability (in 2014, 6.7%[2]).

Lastly, the Mediation Act provides for the so-called court annexed mediation, a mediation ordered by the Judge to the litigants to solve their dispute out of Court before a mediation provider.

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[1] This mandatory mediation, which was not provided in the law enacted by the Italian Parliament delegating the Italian Government to issue a legislative decree on mediation, was deemed as such inconsistent with the Italian Constitution (Constitutional Court Judgement dated 24 October - 6 December 2012, no. 272). Consequently, the Italian Government issued the Decree-Law dated June 21, 2013, n. 69 (passed by Law dated August 9, 2013, no. 98), by which reintroduced the mediation mandatory attempt until 2017.

[2] Data from "*Rapporto sulla diffusione della giustizia alternativa in Italia*", 8th Ed., Isdaci 2016, page 35, published on February 5, 2016, available on http://www.isdaci.it/images/pdf/ebook_ottavo%20rapporto.pdf.

In the first quarter of 2015, out of 57.074 mediation requests filed, mediations on banking contracts represented the 25.6%; on property rights, the 13.2%; on lease, the 11.4%; on joint ownership rights, the 10.7%; and on medical liability, the 6.6%. Data from a paper on the civil mediation drafted by the Italian Ministry of Justice, Statistics DG, "*Mediazione civile ex D.L. 28/2010 - Statistiche relative al periodo 1° gennaio - 31 marzo 2015*", available on: https://webstat.giustizia.it/Analisi%20e%20ricerche/Mediazione%20civile%20al%2031%20marzo%202015.pdf.

Parties could also agree to provide for a mediation clause in their contracts - being this latter case different from the voluntary mediation mentioned above, according to the Mediation Act.

According to official statistics for 2014[3], the most frequent mediation procedure in Italy was the mandatory mediation provided by the Mediation Act. In fact, out of the no. 179.587[4] requests for mediation:

- 83.3% regarded a case of mandatory mediation;
- 10% regarded a case of voluntary mediation;
- 5.6% was a court annexed mediation; and
- 0.6% arose from a mediation clause in a contract.

The typical mandatory mediation case was on banking contracts.

As far as voluntary mediation and mediation arising from a mediation clause are concerned, data shows that they represented the 11.9% of the cases. However, no information about the matters object of these cases is available.

2. Is mediation popular in your country? Why? Why not?

Law dated December 29, 1993 no. 580 provided for a first attempt of introduction of ADR services. Pursuant to Article 2 of this Law, the Italian chambers of commerce was entitled to promote the creation of arbitral and mediation commissions to solve disputes arisen between companies and between companies and consumers. However, notwithstanding this effort made by the Italian legislator, mediation is not very popular in Italy, and a serious debate on mediation started after the introduction of the Mediation Act. In fact, mediation is commonly hindered by:

a. Poor knowledge about mediation and about the key role that a mediator can play in assisting the parties to settle a dispute; this is valid for both parties and their lawyers;

b. Unwillingness to reveal or show any weakness and impotency to the counterparty, refraining to disclose interests and facts during the proceedings;

c. Misleading and false idea of the mediation as being remote from the exercise of the jurisdictional function by the State Courts and, therefore, useless.

From the lawyer's perspective, mediation is also seen as an "***A***(larming) ***D***(iminution) of ***R***(evenue)" possibility, and thus some lawyers do not encourage their clients to resort to mediation.

This notwithstanding, statistics shown a growing attention and a higher diffusion of this dispute resolution method, mainly thanks to the following:

[3] See *Rapporto sulla diffusione della giustizia alternativa in Italia*, pages 34 et seq.

[4] This figure does not include no. 115.423 requests for mediations registered in 2014 by a provider considered as a statistic outlier, receiving only mediation requests on insurance contracts.

- Legislative efforts through the Mediation Act providing for the mandatory mediation attempt;
- Long duration of the ordinary litigation proceedings;
- Some disadvantages of arbitration (*e.g.* high costs); and, in general,
- A deeper consciousness of parties and - most importantly - lawyers on the value of mediation as ADR instrument.

3. How does mediation differ from arbitration/state court proceedings in your country?

Briefly, mediation differs from arbitration/state courts proceedings firstly because the mediator does not settle a dispute arisen between litigants deciding a case, but it assists the parties in settling their dispute. Mediators, unlike arbitrators or judges, are not mandated to strictly respect the *due process principle*, being allowed to convene caucus in the absence of one party during the mediation proceedings. Mediation is also a private and confidential procedure, unlike state courts proceedings. Lastly, the outcome of mediation has usually the form of a settlement agreement - not a judgement or an award -, which is not mandatorily strictly linked to the rules of substantial law applicable to a dispute.

4. In your country, what are the typical disputes where mediation works? When does mediation not work?

According to some authors[5], the typical disputes where mediation works are related to:

- Existing and long duration relationships among the parties;
- Parties that have strong, but also personal, relationship.

The participation of the parties represented by persons who have the power to settle a dispute is also of the essence for a successful mediation. As for the matters, to the best of our knowledge, disputes concerning complex and international commercial contracts are the most likely to be successful. However, the presence of more than two parties renders a mediation not likely to be successful.

According to the latest statistics[6], during 2014:

- in cases of voluntary mediation, 38% of the mediations resulted in a settlement agreement;
- in cases of mandatory mediation, 20% of the mediations resulted in a settlement agreement;
- in cases of court annexed mediation, 15% of the mediations resulted in a settlement agreement.

[5] Among others, see Bonsignore, Vincenza, in *Rapporto sulla diffusione della giustizia alternativa in Italia*, page 36.

[6] See *Rapporto sulla diffusione della giustizia alternativa in Italia*, page 37.

As a result, data clearly show that when parties recourse to mediation spontaneously or by agreeing a mediation clause, one dispute out of four, is successfully solved by mediation.

5. **What psychological aspects need to be taken into account in your country like negotiation tactics and cultural aspects?**

Mainly, the high litigiousness and the will to prevail over the counterparty. A mediator shall thus take these aspects into account and help the parties to overcome such cultural limits in order to reach a successful settlement.

6. **Is there a particular style/approach to mediation in your country? Do mediators tend to approach mediations in a neutral/facilitative way (acting as an intermediary between negotiating parties) or do they adopt an evaluative approach (expressing views/opinions as to merits and/or likely outcomes)?**

The general approach to mediation in Italy follows the neutral/facilitative way. In fact, Italian mediators are mainly trained according to this approach. However, the mediation provided by the Mediation Act has been defined as being between facilitative and evaluative[7]. This is because mediator has the duty to express his/her opinion to the parties, if requested to do so by them, but has also the possibility of adopting an evaluative approach providing them with a possible agreement on the merits (See below Q. no. 11).

Mediator

7. **How is the mediator chosen/appointed in your country? Is there a list?**

Pursuant to Art. 8.1 of the Mediation Act, once a party has filed a request for mediation, the mediation provider shall appoint the mediator by choosing him/her from its list of chartered mediators. The mediation provider shall appoint as mediator, a person according to his/her experience and background in light of the nature and of the object of the dispute.

Many mediation providers allow the parties to nominate jointly a mediator who in any case shall be chosen among the mediators included in their lists.

8. **Who is an eligible mediator? What hinders a mediator from accepting a mediation?**

An eligible mediator can be:

- Someone who holds a bachelor degree or is registered to a professional bar (e.g., chartered accountants, architects, engineers, etc.);
- Someone who attended a two years training course provided by mediation training schools and has joined, during this period, at least twenty mediation proceedings as a trainee mediator.

[7] Castagnola, Angelo; Delfini, Francesco *La mediazione nelle controversie civili e commerciali*, CEDAM 2010, page 29.

Mediator shall also comply with the formal requirements provided by law (*e.g.*, absence of criminal charges, *etc.*).

Before accepting his/her appointment, a prospective mediator shall sign a statement of impartiality and independence and comply with any other requirement set by the rules of the relevant mediation provider.

9. Can a lawyer mediate in your jurisdiction? Does he need training to be eligible?

According to Article 16.4*bis* of the Mediation Act and to the Lawyers' Ethic Code, lawyers admitted to the Italian Bar are automatically mediators. However, this is subject to the lawyers undertaking due training in mediation and settlement techniques and attending specific courses on mediation. As noted above (See above Q. no. 7), also lawyers willing to act as mediators, shall be duly enrolled in a mediation provider.

10. Can a Judge/Court be a mediator in your jurisdiction? If so, are there separate mediation sessions or can a mediation also occur within State Court Proceedings?

The Italian legal justice setting does not provide for a multi-door courthouse system, and thus a Judge/Court cannot act as mediator.

However, as noted above (See above Q. no. 1), having considered dispute's nature, proceedings' stage and parties' behaviour, a Judge/Court can order parties to resort to mediation before a mediation provider. In this latter case, the mediation attempt is considered as precondition for continuing the legal proceedings, and the Judge shall schedule a hearing three months later know whether or not parties mediated the dispute (See below Q. no. 12).

Mediation legislation / Relationship between State Courts and Mediation

11. Is there any state law regulation of mediation or mediators in your country? If so, what are the fundamental principles of such law?

As already mentioned, since 2010 the Mediation Act provides a set of rules on mediation. The fundamental principles of the Mediation Act are set forth by Law dated June 18, 2009, no. 69, and they can be summarized as follows:

- Mediation should apply to rights and obligations on which parties are free to decide themselves, without limiting the access to ordinary justice;
- Mediation should be carried out before specialized and independent mediation providers, listed in a public registry managed by the Italian Ministry of Justice;
- Mediation may also be provided as an online dispute resolution service;
- At the acceptance of the mandate, lawyers shall mandatorily inform their clients of the possibility to have recourse to mediation to solve their dispute and also of the relevant fiscal and tax benefits;
- Mediation proceedings shall not last more than three months;

- An agreement resulting from mediation is enforceable and it can be used to levy on goods, to force the delivery of goods or to register a mortgage on estates;
- In conducting a mediation, mediators should act in an independent, impartial and neutral way.

As a result, the Mediation Act provides that the mediation proceedings shall not last more three months and it shall follow the rules of the mediation provider chosen by the parties. Throughout all the mediation proceedings, a lawyer should assist the parties.

The party willing to mediate a dispute shall file a request for mediation before the mediation provider seated in the same place of the Court that would have jurisdiction over the dispute. The mediation provider shall convene the parties within thirty days from the filing of the first request. During the first meeting, the mediator explains to the parties the main aspects and benefits of the mediation procedure. Consequently, the parties are free to continue or leave the mediation process.

The Mediation Act rules also on the mediation outcomes:

- Lacking an agreement, the mediator shall draft minutes attesting the failed mediation. In case of mandatory mediation, the precondition is considered fulfilled after this first meeting.
- Should the parties spontaneously settle the dispute, an agreement shall be drafted, signed by the parties and attached to the minutes of the mediation. The mediator shall also sign the agreement reached and certify the signatures of the parties.
- Lacking an agreement, the mediator is free to propose to the parties a possible settlement. Moreover, both parties can request him/her to make a proposal. The mediator shall thus send his/her proposal to the mediation provider, who has the duty to inform the parties accordingly. Parties have seven days to accept or refuse the proposed agreement.
    1. In case of acceptance of the proposed agreement, the mediator includes the settlement in the minutes of the mediation and as provided above, collect the parties' signature and certify them.
    2. In case of refusal or missing any answer from the parties within the term, the mediator shall draft minutes including the refused proposed agreement. This may lead to consequences on the court fees in case of a subsequent litigation (See below Q. no. 12).

The Mediation Act also shows specific provisions on the mediators. Briefly, the mediator has the duty to:

a. Execute a declaration on his/her impartiality towards the case and the parties;
b. Inform the mediation provider and the parties of any possible prejudice to his/her impartiality during the mediation;

c. Propose settlement agreements in compliance with the public order and the mandatory rules;

d. Avoid any compensation from the parties other than his/her fees due, pursuant to the rules of the mediation provider; and

e. Maintain the utmost confidentiality on the information collected during the mediation proceedings and on any statement made by parties in mediation, unless expressly authorized by one party to disclose them to the other.

The Mediation Act provides also that the mediator cannot be requested to testify on the declarations rendered by the parties, as well as on the information collected during the mediation. Furthermore, these declarations and information cannot be used during the possible subsequent litigation, unless the party from which that declarations or information comes from, the parties agreeing to their use in court.

Finally, the Mediation Act states that all writs and legal documents in relation to the mediation are fees- and tax-exempted. The agreement resulting from the mediation up to the value of € 50,000 is also exempted from the registration fees.

12. Do the Courts encourage or impose mediation, or impose sanctions for failure to explore mediation, or is it a purely voluntary process?

Pursuant to Article 5.1*bis* of the Mediation Act, when the mediation attempt is provided as mandatory by law, the Judge that ascertains that the attempt has not been performed, shall set a term of fifteen days to the parties to explore mediation.

As mentioned (See above Q. no. 10), pursuant to Article 5.2 of the Mediation Act, the Judge may generally refer parties to explore the possibility to mediate their pending dispute before a mediation provider. This is applicable also to cases pending before the Court of Appeal and until the parties have set their final claims during the final phase of the litigation proceedings.

Should a party miss the first mediation meeting with no serious reasons, the Judge may consider this behaviour as a probative element against that party and can penalise it charging a fixed fee depending on the value of the case. Sanctions can be imposed also to the winning party that has refused a mediation proposal brought forward by a mediator, should the judgement issued by Court have the same contents of the said mediation proposal. These sanctions may include all the proceedings costs, the mediation fees and a fixed fee, depending on the value of the case accrued after the refused mediation proposal.

13. Is an agreement reached during mediation enforceable? Does it need to be confirmed by a Court? What would be the consequences of said confirmation?

An agreement reached during mediation is enforceable should it comply with the requisites provided by the Mediation Act. The agreement should be executed by the parties and their lawyers, and the latter should also verify and certify that the agreement complies with mandatory rules of law and public order.

In the other cases, the party willing to enforce the agreement should file a petition toward the Chairman of the Court where the mediation provider is seated. In the recognition proceedings, the Court shall verify whether the agreement contains any provision against the public order or against mandatory rules of law, performing also a formal exam of the agreement. In cross-border mediation set forth by Article 2 of the Mediation Directive, the agreement is recognized by the Chairman of the Court where enforcement is seeked.

14. Are the mediation proceedings confidential? Is it possible for a party to submit in court elements revealed during the mediation proceedings? How?

The mediation proceedings are strictly confidential. The Mediation Act protects either the so-called "external" confidentiality as well as the "inner" confidentiality of mediation.

From one side, Article 9.1 of the Mediation Act sets as general rule that all persons involved in mediation or with a mediation provider shall refrain from disclosing any information, declaration or document rendered or collected during the mediation to third parties. This duty, which is very broad, is applicable to the mediators, to the parties and to their attorneys, as well as to the managers and the officers of the mediation providers.

On the other hand, Article 9.2 of the Mediation Act rules the so-called inner confidentiality, relating to the mediation proceedings themselves. It provides for a general duty of the mediator not to disclose any element revealed by one party during the caucuses to the other parties, unless expressly authorized to do so. "What happens in mediation stays in mediation."

Article 10 of the Mediation Act rules the duty not to submit any information or declaration rendered or collected during the mediation in any legal proceedings, commenced or to be commenced after the mediation has failed and having the same object, also partially. No witness testimony can be held on the same facts, and the mediator cannot be called as witness in this respect.

The sole possibility to submit in court declarations or information arose in mediation is to have the consent of the party from which those declarations and information come from. However, as already pointed out (See above Qs. no. 11 and 12), should the outcome of a mediation consist in a possible agreement suggested by the mediator, this proposal can be in any case filed in Court.

Conclusions

15. What are the pros and cons of mediation?

In our opinion, the main positive features of mediation can be summarized as follows:

a. Given the long duration of the ordinary litigation proceedings in Italy, mediation is an efficient and fast dispute resolution method;

b. It allows parties to find creative solutions to solve their dispute;

c. There is a high percentage of spontaneous enforcement of agreements reached by mediation;

d. The Mediation Act provides for some fiscal and tax benefits.

Overall, and given the above, a positive mediation helps the parties not to jeopardize their business relationship.

On the other side, the cons of Italian mediation can be the following:

a. Due to the Mediation Act, mediation has been precisely and intensively regulated, eventually burdening the process;

b. The Mediation Act provides that the mediator can or must deliver a proposal to the parties (evaluative approach); unlike other countries' mediation practices, this proposal can be used in Court afterwards, and this may be seen as in contrast with the principle of confidentiality of mediation;

c. As mentioned below (See below Q. no. 17), many mediation providers request an upfront overall payment of the mediation costs, and this hinders some parties to resort to mediation.

16. Is the mediation practice in your jurisdiction influenced by other countries' mediation practices?

The answer to this question is not straightforward, since in this context, the training and experience of the mediators plays a significant role. In fact, Italian mediators acting in complex and transnational disputes are often high skilled and received training also abroad. This can obviously influence their mediation style and eventually the management of the mediation process.

17. Are costs of mediation perceived to be high/low in your country? Who pays for the mediation?

The administrative fees for mediation are higher than the administrative fees for litigation, and thus the parties may perceive the mediation costs as high. Moreover, as mentioned above, parties shall be assisted by a lawyer, and therefore legal costs shall be considered in the overall costs of mediation. However, it is worth noting that the duration of a mediation is significantly shorter compared to the duration of ordinary proceedings in court and that lawyers activities are significantly lower compared to the assistance provided during litigation proceedings. Consequently, in our opinion, the overall cost of mediation results in being considerably low.

The mediation administrative fees are ruled by Ministerial Decree dated October 18, 2010, no. 180, although they can be amended by each mediation provider. The Decree provides for three fees' groups:

a. Fixed filing fees due to access the first meeting before the mediator;

b. Administrative fees due to the mediation provider, should the parties decide to resort to mediation after the first meeting; and

c. An increased fee due in case the parties reach an agreement.

These costs include the fees due to the mediator, who is paid directly by the mediation provider, and they are not related to the number of meetings held or to the hours spent on the case. Each party shall bear equally the costs of mediation, but parties are deemed jointly responsible for the payment of the fees requested by the mediation provider.

Lastly, the administrative fees are reduced in case of mandatory mediation provided by the Mediation Act.

By way of example, a mediation before the Chamber of Arbitration and Mediation of Milan costs as follows:

- For amounts in dispute between € 50,001 and € 250,000
    1. Fixed filing fees amount to € 61 for each party;
    2. Administrative fees amount to € 813.33 for each party for a mandatory mediation and to € 1,220 for a voluntary mediation;
    3. Increased fee for agreement reached amounts to € 305 for each party.
- For amounts in dispute between € 500,001 and € 2,500,000
    1. Fixed filing fees amount to € 109.8 for each party;
    2. Administrative fees amount to € 2,318 for each party for a mandatory mediation and to € 4,636 for a voluntary mediation;
    3. Increased fee for agreement reached amounts to € 1,159 for each party.
- For amounts in dispute over € 5,000,000
    1. Fixed filing fees amount to € 109.8 for each party;
    2. Administrative fees amount to € 5,612 for each party for a mandatory mediation and to € 11.224 for a voluntary mediation;
    3. Increased fee for agreement reached amounts to € 2,806 for each party.

It is worth noting that the fixed filing fees are due for the first mediation meeting and they are not refundable (no. 1 above). Moreover, parties that agree to resort to mediation after the first meeting shall usually correspond to the mediation provider the overall administrative fees due upfront, and they are not refundable (no. 2 above).

To conclude, parties may perceive mediation as not value for money in case they parties decide to resort to mediation after the first meeting, but quit the mediation process early and without reaching an agreement.

18. Are there current mediation trends in your country?

A key trend to be highlighted is the growing number of mediation requests filed due to the provision of the Mediation Act that set the mandatory mediation attempt. As mentioned above, the Mediation Act provided the mandatory mediation duty to be into force until 2017 (See above footnote no. 1). Thus, after this pilot period, the

Ministry of Justice will review the results of the application of the said provisions of law to decide whether amendments or improvements will be needed or not.

19. Do you use any other forms of Alternative Dispute Resolution ('ADR') in your country? If so, please give a brief description of each of those.

The most used form of ADR in Italy is arbitration.

Recently, the Italian Government has issued Decree–Law dated September 12, 2014 no. 132, enacted by the Italian Parliament by Law dated November 10, 2014 no. 162, through which it introduced a new ADR method that can be defined as "negotiation by means of the lawyers' assistance" (in Italian, *negoziazione assistita*).

This form of ADR is characterized by a formal covenant executed in writing by the parties who commit to cooperate *bona fide* and fairly to settle their dispute amicably, with the assistance of their attorneys-at-law.

The negotiation covenant shall expressly include the following:

a. A fixed term agreed by the parties to carry out the negotiation that cannot be lower than one month or higher than three months;

b. The object of the dispute that shall regard rights and obligations on which the parties are free to decide themselves.

This form of ADR is a precondition for bringing legal proceedings related to small claims, intended as payment claims for amount up to € 50,000.

The outcome, as for mediation, can be a settlement agreement, which is enforceable and can be used to register a mortgage on estates. The main difference with mediation is that this negotiation is carried out by parties and lawyers, without the intervention of any third party (mediator).

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