



Mediation

in 16 jurisdictions worldwide

Contributing editor: Renate Dendorfer-Ditges

2013



Published by
Getting the Deal Through
in association with:

Association for International Arbitration

Billiet & Co

Concilia LLC

Craiova Mediation Center

Faleck & Associados

Fiebinger Polak Leon Rechtsanwälte

Heussen Rechtsanwaltsgesellschaft mbH

Indian Centre for Mediation and Dispute Resolution

Jonathan Lux

Kentuadei Adefe, Legal Practitioners, Mediators & Arbitrators

Lalive

Lalive in Qatar LLC

Penningtons Solicitors LLP

Polsinelli Shughart PC

Rowan Legal

Sandart & Partners

SyCip Salazar Hernandez & Gatmaitan

Mediation 2013

Contributing editor

Renate Dendorfer-Ditges
Heussen Rechtsanwalts-gesellschaft mbH

Business development managers

Alan Lee
George Ingledew
Robyn Horsefield
Dan White

Marketing manager

Rachel Nurse

Marketing assistants

Megan Friedman
Zosia Demkowicz
Cady Atkinson
Robin Synnot

Admin assistants

Parween Bains
Sophie Hickey

Marketing manager (subscriptions)

Rachel Nurse
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Gerges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Senior subeditor

Caroline Rawson

Subeditor

Charlotte Stretch

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Mediation 2013

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2012

No photocopying: copyright licences do not apply.

ISSN 2051-4697

The information provided in this publication is general and may not apply in a specific situation. Legal advice should always be sought before taking any legal action based on the information provided. This information is not intended to create, nor does receipt of it constitute, a lawyer-client relationship. The publishers and authors accept no responsibility for any acts or omissions contained herein. Although the information provided is accurate as of October 2012, be advised that this is a developing area.

Printed and distributed by Encompass
Print Solutions
Tel: 0844 2480 112

Introduction Jonathan Lux <i>Independent Mediator and JAMS Panellist</i>	3
Austria Christoph Leon and Magdalena Heigl <i>Fiebinger Polak Leon Rechtsanwälte</i>	5
Belgium Johan Billiet and Dilyara Nigmatullina <i>Association for International Arbitration / Billiet & Co</i>	11
Brazil Diego Faleck <i>Faleck & Associados</i>	18
Czech Republic Martin Maisner and Miloš Olík <i>Rowan Legal</i>	22
England & Wales Donald Lambert, Noel McMichael and Sandie Lyne <i>Penningtons Solicitors LLP</i>	28
Germany Renate Dendorfer-Ditges <i>Heussen Rechtsanwalts-gesellschaft mbH</i>	35
India Sriram Panchu and Avni Rastogi <i>Indian Centre for Mediation and Dispute Resolution</i>	42
Italy Alessandro Bruni and Michela Sitzia <i>Concilia LLC</i>	49
Nigeria Kentuadei Adefe and Neka Okoh <i>Kentuadei Adefe, Legal Practitioners, Mediators & Arbitrators</i>	56
Philippines Ricardo Ma P G Ongkiko, Joan A de Venecia and Jon Edmarc R Castillo <i>SyCip Salazar Hernandez & Gatmaitan</i>	61
Qatar Domitille Baizeau, Catherine A Kunz and Ramy Saleh <i>Lalive in Qatar LLC</i>	69
Romania Sanda Elena Lungu and Constantin Adi Gavrilă <i>Craiova Mediation Center</i>	75
Slovakia Miloš Olík and L'udovít Mičinský <i>Rowan Legal</i>	83
Sweden Christer Holm and Simon Arvmyren <i>Sandart & Partners</i>	88
Switzerland Domitille Baizeau and Catherine A Kunz <i>Lalive</i>	93
United States Mark A Brand, Cathy J Dean and Rodney L Lewis <i>Polsinelli Shughart PC</i>	100

Italy

Alessandro Bruni and Michela Sitzia

Concilia LLC

Law and institutions

1 Treaties

Is your country a signatory to any treaties that refer to mediation? Is your domestic mediation law based on a treaty?

Italy has implemented 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 with Legislative Decree No. 28/2010, which was implemented by Ministerial Decrees No. 180/2010 and No. 145/2011.

Besides the above-mentioned pieces of legislation, many ADR providers (public or private) voluntarily refer – for international mediation (outside the EU) – to the UNCITRAL Model Law on International Commercial Conciliation.

2 Domestic mediation law

What are the primary domestic sources of law relating to domestic and foreign mediation? Are there any differences for the mediation of international cases?

ADR methods have generally been known about in Italy for a long time, but mediation in particular has only started to receive attention for its serious development as a means of dispute resolution over the past 15 years or so.

Before the last Italian law on mediation was enacted (Legislative Decree No. 28 of 4 March 2010), the most significant innovation over the past few years for the development of mediation in Italy was contained in Legislative Decree No. 5/2003 (now repealed by the above-mentioned Decree No. 28/2010, which has taken its place and has broadened the scope of the attempts of mediation to all civil and commercial disputes). Decree No. 5/2003 provided for both mediation and arbitration in disputes within a company (and certain other circumstances as, for instance, banking and financial disputes).

Law No. 129 of 2004 entitled ‘Rules for the regulation of the franchising’, in article 7, entitled ‘Mediation’, states that for disputes relating to the franchising agreement the parties may agree that prior to court proceedings or arbitration, an attempt at mediation should be made at the mediation office of the chamber of commerce in whose territory the franchisee has the main office. At the mediation proceedings the provisions of Legislative Decree No. 28 of 2010 shall apply *mutatis mutandis*.

Legislative Decree No. 206 of 2005 (the Consumer Code) reorders the legislation on consumers and is the fundamental reference text for the protection of the rights of consumers and users.

The Consumer Code provides that the associations of consumers and users and other entities have the option, before judicial proceedings, to attempt mediation before the mediation office of the local chamber of commerce or other mediation providers competent under article 141 of the Consumer Code. The Code provides that

the duration of the procedure is limited to 60 days (period within which it must always be settled).

The mediation record, signed by the parties and the representative of the mediation provider, is lodged at the court of the place where the mediation was held for the approval of the judge, who makes it enforceable.

The Consumer Code provides for both offline and online mediation in order to settle disputes between consumers and professionals.

In 2006, Law No. 55, entitled ‘Amendments to the Civil Code on family pacts’, introduced article 768-octies of the Italian Civil Code, which says that disputes arising from provisions related to transfers of family businesses to descendants must be sent to one of the mediation bodies accredited by the Italian Ministry of Justice.

In 2007, by a regulation issued by the Authority for Telecommunications Supervision with Resolution No. 173/07/CONS, new procedures entered into force for settling disputes between users and operators of telecommunication services.

This Resolution states that the attempt of mediation is a ‘condition of admissibility’ of judicial action against suppliers of services, but widens the different procedures available to users.

On the website of the Authority for Telecommunications Supervision (www.agcom.it) it is possible to download the forms by which the user can carry out:

- requests for provisional measures to the continuity of telecommunication service (Form GU5);
- requests for mediation (Form UG); and
- requests for application for settlement of the dispute to the Authority (Form GU14).

A novelty is the recognition of absolute equality – as to the condition of admissibility – between mediation proceedings managed by the mediation chambers established at the public offices for telecommunication (Corecom), those managed by the chambers of commerce and those managed by bodies that have arisen from joint agreements between consumer associations and telecommunications operators, and finally from all mediation providers recognised by the Consumer Code.

Legislative Decree No. 179 of 2007 on the institution of an Arbitration and Mediation Chamber within the Italian National Commission on Companies and the Stock Exchange (CONSOB) provides for the establishment of a chamber of mediation and arbitration for resolving disputes between investors and brokers, because of violation by the brokers of requirements concerning information, fairness and transparency in contractual relationships with investors, and a system of compensation for damage suffered by investors and a special guarantee fund.

The legislation provides that the Chamber of Conciliation and Arbitration of CONSOB can make use of the mediation services of the mediation bodies entered in the Register of the Ministry of Justice.

3 Mandatory provisions

Are there provisions of domestic mediation law that must be considered in mediation?

Authorisation to mediate

For the purposes of the new legislation, mediation should be handled only by mediation bodies accredited by the Ministry of Justice.

Mandatory attempt of mediation

In certain disputes Italian law requires a previous mandatory mediation attempt.

Duration

The mediation proceeding can last for up to four months, after which the mediation attempt can be considered to be satisfied.

Confidentiality

The mediation process protects confidentiality and professional secrecy.

Enforceability

The mediation minutes may become enforceable.

Penalties

Those not participating (without reason) in a mediation are required to pay some court costs in subsequent litigation.

Exemptions and benefits

The minutes of mediations with a value under €50,000 shall be exempt from payment of registration fees.

All records and documents relating to the mediation process shall be exempt from stamp duty, and any expenses and taxes.

The poor can benefit from legal aid, and can freely participate in mediation.

The parties to mediation can benefit from a tax credit up to a maximum of €500.

4 Obligation to mediate

Is mediation in your country obligatory? Can mediation be ordered by courts in your country?

In Italian law a prior mediation attempt is only required in certain disputes. From the 1990s the legislature began to require mediation or conciliation and inserted provisions in this respect while passing laws that dealt with reforms in various sectors.

- Law No. 320 of 1963 provides for the obligatory attempt to mediate the dispute before the agricultural sections of the court.
- Law No. 481 of 1995 prescribes a mandatory attempt of mediation in disputes related to public utility services.
- Law No. 192 of 1998 prescribes an attempt of mediation for disputes between contractors and subcontractors. The mediation attempt must take place at the chamber of commerce where the subcontractor has its headquarters.
- Law No. 183 of 2010 provides for a mandatory attempt to mediate in certain disputes related to employment contracts.

In civil and commercial matters, the mediation attempt is considered by Legislative Decree No. 28/2010 as 'voluntary' for all disputes, but it is a condition for admissibility of a judicial action, and therefore 'mandatory', for disputes relating to: co-ownership of land (*condominio*); property rights; division of assets; hereditary succession; family agreements; leasing; loans; commercial leases; medical liability; defamation; road and boating accidents; insurance; and banking and financial agreements. The parties, in those cases, must first attempt to resolve their disputes through mediation before submitting them to the Italian judicial system. If a party initiates

proceedings before the court without first resorting to mediation, the judge shall suspend the case and order the parties to mediate. Such mediation has to be conducted by one of the ADR providers accredited by the Italian Ministry of Justice. The Legislative Decree provides that the unjustified failure of a party to appear at the mediation procedure can be considered by the judge in the subsequent judicial proceeding and trigger negative inferences, on the basis of article 116(2) of the Code of Civil Procedure. Additionally, new legislation (Law No. 148 of 14 September 2011) provides that, in the above-mentioned case, a party who fails to appear will be obliged to pay an amount (equal to the amount that a party must pay to the state when he or she participates in a judicial proceeding) to the state as a form of sanction. If a mediation clause is contained in advance in a contract or in a company's constitution and if a party has commenced a judicial proceeding without trying to mediate, the judge or the arbitrator – upon request of the interested party – must postpone the proceeding and fix a time, with a maximum of 15 days, by which the parties should request mediation by an accredited provider.

Generally, judges are not permitted by law to refer cases to mediation. They can only advise the parties, during the trial, to try to mediate their case. Only in some cases, as provided in Legislative Decree No. 274 of 2000 (relating to the criminal competence of the Italian judges) can the judge promote mediation, or refer the parties to a public or private mediation centre.

In other cases judges may only advise the parties to try mediation, but may not specify the mediator or the mediation provider (pursuant to Legislative Decree No. 28 of 4 March 2010).

5 Mediation-arbitration

Is mediation often combined with arbitral proceedings? May a mediator act later in the same dispute as an arbitrator, conciliator or judge?

Generally speaking hybrid ADR methods are not often used in Italy.

That said, it is important to consider that some chambers of commerce and private ADR providers offer combined ADR instruments such as med-arb and med-then-arb (alongside mediation and arbitration).

The use of arb-med is restricted to some particular complex cases and some high-profile ADR providers (Concilia, ADR Center, etc).

Only if the ADR body in which a mediator is accredited permits it may the mediator also act as arbitrator for the same parties and on the same controversy. In general, the appointment of different professionals is more common: one for the attempt of mediation and the other as arbitrator (or as a member of the arbitral tribunal).

In a civil trial, if a judge attempts to mediate between the parties and mediation fails, however, the same judge may continue the trial.

6 Confidentiality and disclosure

Is mediation a confidential proceeding in your country? In which cases can disclosure of confidential information by the mediator or the parties be permitted or compelled? Are there any sanctions for breach of confidentiality?

All mediators shall keep confidential any information arising out of (or in connection with) the mediation, including the fact that the mediation exists and has been conducted between the parties.

In addition, Legislative Decree No. 28 of 2010 provides that mediators may not be called as witnesses and the parties may not rely on any communications made or any information collected during mediation in the subsequent judicial proceedings.

In particular, article 9, entitled 'Duty of confidentiality', states that anyone who works in a mediation provider accredited by the Ministry of Justice is bound by an obligation of confidentiality with

respect to statements made and the information acquired during the mediation process. In addition, the same article states that the mediator shall be held to confidentiality in relation to all other parties, with regard to the statements made and to the information acquired during the caucuses (separate sessions), except with the consent of the registrant, or the consent of the party from whom the information originated.

Article 10, entitled ‘Usability and professional-secrecy’, sets forth that the statements made or the information acquired in the course of a mediation process cannot be used in a trial having the same object, even in part, that has begun, been summarised, or continued after the failure of mediation, except with the consent of the registrant or the party from whom the information originated. Furthermore, the evidence of witnesses is not allowed on the content of those statements and information.

The article further states that the mediator may not be required to testify about the content of the statements made and the information gathered during the mediation process before the court or other authorities.

In addition, in accordance with article 22 of Legislative Decree No. 28 of 2010, the mediator must report suspected money laundering or terrorist financing to the competent authority. The disclosure of confidential information by the mediator or the parties is permitted or compelled in the cases provided by article 7 of EU Directive No. 2008/52/EC.

7 Limitation period

Does a mediation proceeding suspend the limitation period for a court claim?

The request for mediation upon being communicated to all the parties convened in the mediation interrupts the timeline for a court action and, provided that it is the first such request, will prevent a right of action from expiring; but if the mediation fails, the proceedings must be brought within the same period of the limitation that starts from the filing of the report of failure to mediate.

8 Settlement

What is the legal character of the final (settlement) agreement? What are the legal requirements for the enforceability or the content of the agreement? Is it possible to revise, withdraw or challenge the final settlement agreement?

Legislative Decree No. 28 of 2010 has introduced a form of multi-step procedure: while mediation is the process in which a professional mediator helps the counterparties to resolve their dispute, conciliation is the positive result of the mediation process, the settlement.

The new law establishes that if an amicable settlement among the parties is reached, the mediator compiles the mediation minutes to which the text of the mediation agreement is attached. The request of enforceability is possible only for the mediation minutes (a document that the mediator draws up and that is signed by all the participants to the mediation procedure), not for the mediation agreement, which has the nature of a private contract (and is composed and signed by the parties, not by the mediator).

A party may request enforceability of the mediation before the president of the tribunal of the place in which the mediation provider has its headquarters. The request must be made by depositing the mediation minutes and the attached mediation agreement.

Before granting enforceability, the judge will verify that the content is not contrary to public policy or mandatory rules, and checks for compliance with formalities.

Following a grant of enforceability, the mediation minutes will be enforceable for (i) compulsory expropriation; (ii) specific performance; and (iii) recognition of judicial mortgage.

In cross-border disputes, the mediation minutes are approved by the chief judge of the district in which they are to be performed.

9 Mediation institutions

What are the most prominent mediation institutions in your country?

In Italy public and private mediation providers are accredited by the Ministry of Justice for conducting civil and commercial mediation upon the provisions of Legislative Decree No. 28 of 2010 (there are more than 900 bodies at the time of writing, and the number will increase every month).

As for the public, the 104 Italian chambers of commerce are the more prominent public ADR bodies: each of them has a mediation and arbitration chamber.

Among them, the more well known are:

- the chamber of mediation of the Milan Chamber of Commerce;
- the chamber of mediation of the Rome Chamber of Commerce; and
- Curia Mercatorum, an association of private law, not for profit, owned by several chambers of commerce, trade associations and professional associations, and led by the chamber of commerce of Treviso.

As for the private ADR providers, the most prominent are:

- Concilia (www.concilia.it), which since 1999 has provided training and consultancy services in civil and commercial negotiation, mediation, conciliation and arbitration. Concilia is headquartered in Rome, with accredited secondary offices in Italy and abroad. Concilia is accredited by the Italian Ministry of Justice for conducting civil and commercial mediations and for organising training for professional mediators. Furthermore, Concilia is connected with many ADR providers in Europe and abroad and is one of the founding members of the largest European network of commercial ADR providers (www.arbitration-adr.org/network).
- ADR Center, an organisation of mediators and arbitrators dealing with the resolution of disputes (www.adrcenter.it), providing ADR training and consultancy services. It is headquartered in Rome with branch offices in Italy and abroad. ADR Center is accredited by the Italian Ministry of Justice for conducting civil and commercial mediations and for mediators’ training.
- Conciliatore Bancario e Finanziario (Banking and Financial Mediation Provider). This was born from an initiative led by the first 10 Italian banking groups to give customers a fast and efficient alternative to court proceedings (www.conciliatorebancario.it).
- The Chamber of Mediation of CONSOB, which was created to try to resolve, through mediation, banking and financial disputes (www.camera-consob.it).
- ADR Notariato, created by the National Council of Notaries with multiple offices in Italy (www.adrnotariato.org).

Mediation procedure

10 Background

Describe the development of mediation in your country.

Even though mediation in its multiple forms (family, civil, commercial, corporate, environmental, social, etc) has been well known in Italy for many years, only recently have a general professionalism and common ethical standards been established for almost all forms of mediation.

In certain cases, however, there are still barriers to the use of mediation, and lawyers specifically are divided between those in favour of mediation and others who are absolutely opposed to it. The role played by the Italian chambers of commerce and by a few private ADR providers in the advancement of mediation procedures is undeniable.

The Ministry of Justice regularly publishes statistics regarding civil and commercial mediations in Italy. The latest statistics indicate that attempts to mediate have reached approximately 91,600, from 21 March 2011 (date of entry into force of Legislative Decree No. 28 of 2010) to 31 March 2012. The highest success rate was recorded by private bodies (51.4 per cent), followed by chambers of commerce (49.8 per cent) and the bar associations (34.5 per cent).

The number of attempted mediations where the opposing party attended proceedings increased from 25 per cent in the first quarter of 2011 to nearly 40 per cent in the first quarter of 2012.

During the examined period, the majority of mediation attempts have involved disputes concerning rights in rem, leases, bank contracts, financial contracts and medical liability; while the average value of the disputes brought to the mediation was €118,299.

11 Areas of disputes for mediation

In which areas of disputes is mediation preliminarily applied? Are there any disputes that cannot be mediated?

Currently, mediation is used for a wide range of disputes from civil to commercial, corporate, financial, banking, insurance, family, environmental, labour, consumer, criminal and social.

Criminal mediation, however, is used only in the case of offences prosecuted upon complaint, and in juvenile proceedings.

In addition, on the basis of what is required by the European Directive on mediation, mediation attempts do not extend to revenue, customs or administrative matters or the liability of the state for acts and omissions in the exercise of official authority. On the contrary, only those matters that involve the liability of public authorities for non-authoritative acts fall into the category of disputes governed by Legislative Decree No. 28/2010.

12 Procedural requirements

Are there procedural requirements for mediation proceedings in your country? Must the parties prepare for the mediation?

No, the mediation procedure is very informal and the parties do not necessarily have to prepare summaries or keep records or documents.

The mediation procedure, however, is started with the filing – by the claimant – of a written request for mediation. The request must be transmitted by the ADR provider to the defendants by any means that can ensure the receipt of the documents: postal services, fax or certified e-mail.

13 Structure and process of mediation

Describe the most common steps for the mediator's preparation of a mediation proceeding. Describe the most common structure of mediation proceedings. What is the typical time frame for a mediation proceeding? Are there any special considerations for international mediation proceedings?

The entire proceeding in this case can be described as follows:

- the parties (or one of them) submit a written mediation request to an independent qualified professional ADR provider accredited by the Ministry of Justice;
- the chosen ADR provider designates an independent mediator (chosen from among the mediators accredited by the ADR provider) and arranges the initial meeting between the parties;

- the date, location and the name of the chosen mediator are communicated to other parties by the ADR provider and by the party who initiated mediation, if he or she wants to ensure that other parties have received the communication; and the fees payable to the accredited mediation bodies and to the mediator, to be borne by the parties, are provisionally established; and
- at this point two different scenarios are possible, depending on the choices of the parties to the mediation: (i) if the parties are able to reach a written agreement, the mediator drafts the minutes of the meeting that must be signed by all the parties and by the mediator; or (ii) if no agreement is reached at the parties' request the mediator must issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse. If either party refuses the proposal, the mediation is considered to have failed and any party may commence a lawsuit. But if the judicial decision is identical to the previous mediator's proposal, such decision may affect the allocation of judicial expenses because the court will refuse to award all the costs and the expenses to the winning party if that party has previously rejected the mediator's proposal. In such circumstances, the court will order the winning party to pay the losing party's costs and court fees.

14 Mediation style

What is the primary mediation style in your country for commercial mediation: facilitative mediation, evaluative mediation or transformative mediation? Are private sessions (caucuses) or joint sessions, or both commonly used in mediation?

At any stage of the mediation procedure the parties may mutually ask to the mediator to formulate a written proposal and he or she is obliged to issue a non-binding proposal about resolution of the dispute, which the parties may choose to accept or refuse.

If no agreement is reached by the parties, before writing the mediation minutes, the mediator may voluntarily issue a non-binding proposal to try to help the parties reach an agreement on the basis of his or her proposal.

The primary mediation style for commercial mediation is 'facilitative' and, if the mediator thinks it to be opportune, or if the parties require it, the style may change to 'evaluative'. Whatever the style, Italian mediations are managed with the use of joint and private sessions.

15 Co-mediation

What form does team mediation typically take in your country? Is co-mediation regularly used in your country? In which kind of cases?

Generally speaking, use of a sole mediator is most common.

Co-mediators are more often used in family cases and for complex business mediations, or for multiparty mediation. Even for environmental mediation, co-mediators are used to resolve both legal-economic and social-relational aspects. Often, in these cases, lawyers (or accountants) act alongside sociologists or psychologists as mediators.

Further, the new law on mediation (Legislative Decree No. 28/2010) establishes that in disputes that require specific technical skills, the ADR provider may appoint one or more auxiliary mediators.

16 Party representatives and third parties

What is the practice in your country with respect to the inclusion of party representatives in mediation proceedings? What is the practice with respect to experts and witnesses?

The Italian legislation does not require the presence of consultants in mediation proceedings, but it is always recommended by the ADR

providers that parties are accompanied by professional advisers, especially when the dispute is complex and difficult.

Legislative Decree No. 28/2010 sets out special rules applicable only to lawyers. When a lawyer has been appointed, he or she must inform the client about the possibility to use the mediation process and about the tax benefits that may come from a mediation procedure governed by Legislative Decree No. 28 of 2010. The lawyer will also inform the client of the cases in which the mediation is a condition of admissibility of the claim. The information must be provided clearly and in writing. In case of breach of information obligations, the contract between the lawyer and the client is voidable. The document containing the information about the mediation procedure is signed by the customer and must be attached to the application for any court proceeding. The court, which verifies whether that document is attached to the application, informs the party of the right to request mediation, or sets the first hearing after the expiry of the deadline for the obligatory attempt at mediation (within four months of filing the mediation before an accredited provider).

Some mediation providers, such as Concilia, stipulate in their mediation rules that individuals must personally participate in the mediation process, being able to be assisted by one or more persons of their choice. Only for serious and exceptional reasons may they participate in the proceedings using one or more representatives with the power to settle the dispute; while legal persons must participate in the process of mediation by a representative with the appropriate authority to resolve the dispute. Some mediation rules require the assistance of an attorney for each party for mediations whose value exceeds a certain amount (usually €50,000), unless the parties expressly waive this in writing.

With respect to experts and witnesses, the new law indicates that in complex cases, in addition to possible co-mediation, the mediator may make use of experts enrolled in the register of consultants in the courts. Parties may make use of their own experts and witnesses.

Lawyers and other assistants of the parties, as well as co-mediators, experts and witnesses, shall apply the rules of confidentiality provided for in the law.

17 Specific mediation procedures/conflict or dispute management systems

Have companies set up their own dispute management systems in your country? Are there any special routes for consumers to use mediation for small claims? Are there any institutions that offer mediation for their customers, users, etc? Is online mediation available in your country?

Some ADR providers are specialised in creating dispute management systems for companies. However, mediation in civil and commercial matters must always follow the directions of Legislative Decree No. 28 of 2010. Systems are especially used to automate the processes that are the basis of any kind of mediation, such as requests for mediation, submission of documents, responses to individual requests by the ADR provider, etc.

Legislative Decree No. 206 of 2005 (the Consumer Code) provides that associations of consumers and users may, prior to judicial proceedings, attempt mediation before the local chamber of commerce or other competent mediation providers. In such cases the duration of the mediation procedure is limited to 60 days, after which it is considered settled.

As a member state of the EU, Italy applies EC Regulation No. 861 of 2007 of the European Parliament and of the Council, which established a European small claims procedure in cross-border cases. The Regulation is applicable to civil and commercial matters, whatever the nature of the court or tribunal, where the value of a claim does not exceed €2,000 at the time when the claim form is received by the court or tribunal with jurisdiction, excluding all

interests, expenses and disbursements. It does not extend, in particular, to revenue, customs or administrative matters or to the liability of the state for acts and omissions in the exercise of state authority.

The legislation also provides that – where possible – the court shall attempt to reach a settlement between the parties.

Electronic dispute resolution systems are beginning to enter the Italian market. In the management of small claims disputes in particular, ADR providers offer the possibility to manage the mediation online, through the use of audio-video conferences and encrypted chat-rooms.

Although some ADR providers already use online mediation systems, the new legislation sets forth that the ADR accredited providers' mediation rules cannot stipulate that access to mediation be carried out exclusively by electronic means.

Mediation agreement

18 Conclusion and content

Is there any obligation to conclude an agreement between the mediator and the parties or between the parties before or at the beginning of the proceeding? Are there any legal requirements regarding the content of the agreement between the mediator and the parties? What are the common provisions for such mediation agreement? Must the agreement be in writing?

The parties are free to conclude a mediation agreement at their discretion. Nevertheless, the parties may themselves undertake a mediation attempt in advance, through the provision of a specific contractual mediation clause in their mediation agreement.

As said before, during mediation the parties may only oblige the mediator to issue a non-binding written proposal.

19 Costs for mediation

Are there any legal provisions on mediators' fees? What is the average mediator's fee in mediations involving companies? Is there any legal aid or other financial support for mediation proceedings if parties cannot afford to pay the mediator?

For mediation mandated by law, there is an identical tariff for both public or private providers. With regard to voluntary mediations, each provider may set its own rates, which must be approved by the Ministry of Justice.

Parties are jointly and severally obliged to pay the fees and the fees increase in proportion to the value of the dispute. The mediator is paid by the provider, with a percentage of the fee that the parties pay to the same provider.

Public rates range from a minimum of €65 to a maximum of €9,200.

Professional matters for mediators

20 Regulation

Is there any specific regulation of mediators in your jurisdiction? Give details. Are there any regulations on immigration or tax issues or regarding the right to work for foreign mediators?

Mediators must possess at least a bachelor's degree or, alternatively, must be enrolled in a professional association or board.

Moreover, an accredited mediator must meet the following criteria: (i) he or she must not have a criminal record; (ii) he or she must not be permanently or temporarily disqualified from public office; (iii) he or she must not have the subject of preventive or security measures or safety; and (iv) he or she must not have been subject to disciplinary sanctions other than disciplinary warnings.

In addition, no mediator may declare him or herself willing to act as mediator for more than five accredited mediation providers.

Mediators may not assume rights and obligations, directly or indirectly, in the mediations they oversee. In addition, the mediators may not receive monetary compensation directly from the parties. The payment must be made directly to the mediation provider.

Before every mediation, the appointed mediator must: (i) sign a declaration of impartiality; (ii) notify to the mediation provider and to the parties all the reasons for possible damages to the impartiality; and (iii) respond to any organisational request of the mediation body.

21 Training

Are there any requirements regarding training for mediators?

The law states that civil and commercial mediators should have specific training (at least 50 hours) acquired from accredited ADR training centres.

The basic content of the training is laid down in the legislation as follows: national, EU and international legislation on mediation and conciliation; methodology of facilitative and award procedures of negotiation and mediation; conflict management and communicative interaction techniques, also with reference to mediation referred by the court; effectiveness and operation of the mediation clauses, form, content and effects of the request for mediation and of the conciliation agreement, duties and responsibilities of the mediator.

The training is divided into theoretical and practical parts, with a maximum of 30 participants per course, including simulated sessions with student participation, and a final examination for a minimum of four hours.

22 Continued education

Must mediators undertake continued professional education? Is there a credit point system for the continued education of mediators?

The law prescribes that civil and commercial professional mediators must take refresher courses (at least 18 hours every two years), and establishes their participation, during each two-year period, and for purposes of professional education, in at least 20 mediations managed by mediation organisations accredited to the Ministry of Justice.

23 Accreditation of mediators

Outline the system for certification of mediators.

Formal registration with the Ministry of Justice is required for those (ADR providers and mediators) wanting to conduct mediations in compliance with the new law. This means that, at present, only those ADR bodies listed on the Ministry Register (www.giustizia.it) can act as an accredited ADR provider (with their accredited mediators) in civil and commercial mediations and other disputes covered by the current legislation.

The same is required for mediators: to work, a professional mediator who has passed an accredited training course (organised and managed by an accredited ADR training centre) needs to be accredited into the mediators' panel of an accredited ADR provider; otherwise, he or she cannot operate.

Parties who entrust their civil and commercial dispute to an unregistered ADR provider and before an unregistered mediator risk not being able to enforce any resulting agreement. It seems that the legislature believes this interventionist regulatory approach is best for Italy, and that this is the most appropriate way to implement Directive No. 2008/52/EC in the Italian judicial system.

Apart from the special ministerial authorisation of ADR providers and mediators dealing with civil and commercial mediations under Legislative Decree No. 28 of 2010, there is a two-tier system in Italy, where ordinary mediators (not accredited by the Ministry of

Justice) may deal with mediations in family, environmental, social, criminal and consumer disputes. Obviously, except for some provisions, a mediation managed by ordinary mediators may not have all the positive outcomes of a mediation under an accredited ADR provider and managed by an accredited mediator.

24 Mediator liability and sanctions

What are the duties of mediators in a mediation procedure? What liability do mediators face when offering their services and conducting mediation proceedings? Is professional indemnity insurance for mediators available or obligatory? Are there any further sanctions or other disciplinary measures for mediators in cases of misconduct, poor performance, etc? Are there any regulations referring to the dismissal of mediators?

The mediator must keep information acquired in joint and separate meetings confidential. In addition, the mediator must remain impartial, neutral and independent from all the parties of the mediation. The mediator must also inform the parties and the ADR provider which appointed him or her of every circumstance that may affect his or her impartiality and independence during the mediation. The mediator must monitor that the parties do not perpetrate crimes or fraud during the mediation procedure.

The mediator may be liable for wilful misconduct or gross negligence, for improper behaviour adopted during the mediation procedure he or she runs. The mediator may only be liable for the management of the mediation and for the preparation of the written minutes of mediation. The subsequent written agreement of the parties, which will be attached to the minutes of mediation does not place any liability on the mediator.

Accredited ADR providers must possess an insurance policy for an amount not less than €500,000, for liability arising – for any reason – from the management of the mediations.

To date, Italian law does not oblige accredited mediators to have professional liability insurance, who are covered by the insurance of their ADR body, but if a liability arises, and the ADR provider uses its insurance, the mediator can be obliged to reimburse the ADR body if he or she is found to be at fault.

The mediator may be dismissed at any time by the ADR mediation body; the mediator is not an employee of the ADR body, but acts as external adviser. The ADR body, therefore, may decide to remove the mediator from its list, especially in the event of misconduct or poor performance. Each ADR body has its own rules for evaluating the performance of its mediators. For example, some ADR bodies have accredited mediators that have a system of monitoring of their performance certified by other external entities.

At the end of every mediation process, each party receives a form for the evaluation of the service and of the mediator: such an assessment of the parties may affect the subsequent assessment of mediator by the ADR provider.

The law provides for cases in which the mediator may be expelled from the ADR providers that accredited him or her. An example is when the mediator has not taken a refresher course every two years, or no longer fulfils all the criteria to practise as a mediator.

25 Appointment

Is there any regulation regarding the appointment of mediators? Is it common in your country to seek assistance by institutions or official bodies for the appointment of mediators? Are mediators obliged to inform about conflicts of interest in the course of appointment?

The rules of the ADR bodies must provide – by law – the possibility that the parties voluntarily and mutually indicate the same mediator, for the purpose of his or her possible nomination by the ADR body.

Update and trends

After little more than six months from the entry into force of Legislative Decree No. 28 of 2010, Italian judges referred some ordinances to the attention of the Constitutional Court and to the European Court of Justice to settle the debate and the alleged controversial interpretations that have arisen from the legislation.

The numerous legal issues raised before the major national and European bodies are symptomatic of how Italy still has not completely realised the importance mediation may have on the Italian judicial system, or has not yet acquired all of the confidence in a process governed by subjects that are outside the judicial system (the accredited mediation providers).

The European Commission, however, recently recognised Italy for the way it is pursuing mediation, although it is undeniable that the new law on mediation contains gaps that require clarification by the Constitutional Court as soon as possible.

In reference to the Italian institutions, the first issue of the constitutionality of the Italian legislation on mediation was raised by the Regional Administrative Court of Lazio before the Constitutional Court on 12 April 2011. This concerns:

- the mandatory mediation attempt in some subjects (indicated in article 5, paragraph 1, Legislative Decree No. 28 of 2010);
- the condition of admissibility of the proceedings before the court; and
- the objection of inadmissibility by the defendant or by office.

In reference to the European institutions, the first question was raised by the Court of Palermo on 16 August 2011, which asked

the European Court of Justice whether articles 3 and 4 of Directive No. 2008/52/EC on mediation can be interpreted as requiring the mediator to have adequate professional and juridical skills, and whether his or her nomination should be made on the basis of his or her experience in the subject matter of the litigation, in addition, if the article 1 of that Directive may be interpreted in such a way as to guarantee the territorial jurisdiction of the mediation providers.

The Constitutional Court has set a hearing date of 23 October 2012 to discuss the issue of the unconstitutionality of the Legislative Decree No.28 of 2010.

On 24 October 2012 the Italian Constitutional Court decided that compulsory mediation is unconstitutional for excess of delegation of the government in the part in which it provides for compulsory mediation (Legislative Decree No. 28/2010, article 5, paragraph 1).

Until the decision is published the regulatory system shall remain as it currently stands. The decision will take effect from the date of its publication in the official gazette. In fact, article 136 of the Italian Constitution states that: 'when the Court declares the constitutional illegitimacy of a law or enactment having the force of law, the law ceases to have effect from the day following the publication of the decision.' At the time of writing, the decision has not yet been published.

In any case, voluntary mediation will not be affected by the decision of the Constitutional Court, and Legislative Decree No. 28/2010 remains in force.

Moreover, the law provides that if the mediator is not jointly chosen by the parties, the ADR bodies shall appoint the right mediator among those accredited, taking into account the professional competences, also derived from the type of university degree held, besides other factors of competence and professionalism.

As mentioned above, the mediator, at the time of his or her appointment, must sign a declaration of impartiality. The mediator must not have any previous relationship with the parties, nor have relations of kinship, affinity, marriage with any of them. In addition, the mediator must not have been the adviser or the lawyer of one of the parties before the mediation.

such conduct is committed intentionally in violation of a mandatory provision, which protects due process.

Court of Varese, sez. I civ., order of 6 July 2012

Once the parties have been invited by the court to establish the mediation process, and mediation is successful, the parties need not state in the trial the success of the mediation, but can cause the court action to cease simply by not participating in the subsequent hearing.

Court of Ostia, judgment of 5 July 2012

The non-appearance of the party duly summoned to attend a mediation is generally an integrative element in favour of the requesting party for the investigation and the proof of the liability of the party that did not appear in mediation.

Cases

26 Notable cases

Briefly give details of any significant recent mediation cases or disputes or judgments involving mediation that have been published in your country?

Recent judgments

Court of Siena, judgment of 25 June 2012

The failure to participate in mediation by the party who brought the request for mediation is considered evasion of the law, because



Alessandro Bruni
Michela Sitzia

alessandro.bruni@concilia.it
michela.sitzia@concilia.it

Via Castelfidardo, 18
00185 Rome
Italy

Tel: +39 06 42016845
Fax: +39 06 93387583
www.concilia.it

Annual volumes published on:

- Air Transport
- Anti-Corruption Regulation
- Anti-Money Laundering
- Arbitration
- Asset Recovery
- Banking Regulation
- Cartel Regulation
- Climate Regulation
- Construction
- Copyright
- Corporate Governance
- Corporate Immigration
- Data Protection & Privacy
- Dispute Resolution
- Dominance
- e-Commerce
- Electricity Regulation
- Enforcement of Foreign Judgments
- Environment
- Foreign Investment Review
- Franchise
- Gas Regulation
- Insurance & Reinsurance
- Intellectual Property & Antitrust
- Labour & Employment
- Licensing
- Life Sciences
- Mediation
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil Regulation
- Patents
- Pharmaceutical Antitrust
- Private Antitrust Litigation
- Private Equity
- Product Liability
- Product Recall
- Project Finance
- Public Procurement
- Real Estate
- Restructuring & Insolvency
- Right of Publicity
- Securities Finance
- Shipbuilding
- Shipping
- Tax on Inbound Investment
- Telecoms and Media
- Trademarks
- Trade & Customs
- Vertical Agreements



For more information or to purchase books, please visit:
www.GettingTheDealThrough.com



Strategic research partners of the ABA International section



THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012



The Official Research Partner of the International Bar Association