Italy

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LAW AND POLICY

Definitions

1 | Is there any legal definition in your jurisdiction of the terms 'ADR', 'conciliation' and 'mediation'?

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 the Italian law in force about civil and commercial mediation Legislative Decree No. 28/2010.

That law has introduced a form of multi-step procedure: although 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.

Although the term 'mediation' refers to the activity, however named, carried out by an impartial third party who aims to assist two or more parties in finding an amicable settlement of a dispute, including the formulation of a settlement proposal for the resolution of the dispute; 'conciliation' refers to the settlement of a dispute following the mediation procedure.

Consequently, the term 'mediator' refers to a person or persons who, individually or collectively, conduct the mediation, without the power to render binding decisions or judgments.

In many previous laws the term 'conciliation' referred (and still refers) to an activity of negotiation (and persuasion) to reach a possible agreement between the litigants) carried out by judges during their processes, at any stage and degree (as prescribed by laws and civil procedural code).

The term 'conciliation' is also used in labour law cases for indicate negotiations (sometimes mandatory by law) between employers and employees in front of the provincial labour directorates.

The term 'mediation' is also used to indicate the dispute settlement procedures in cases of family disputes between spouses.

Mediation models

2 | What is the history of commercial mediation in your jurisdiction? And which mediation models are practised?

Conciliation and mediation are well known in the Italian judicial system since when the Consolidated Text of Public Security Laws No. 593, approved by Royal Decree No. 773 of 18 June 1931, at article 1 stated that The Public Security Authority (...) through its officers, at the request of the parties, provide for goodwill composition of private disagreements'.

In 1942, endo-judicial conciliation was inserted into the Italian Code of Civil Procedure.

Although the term conciliation was present in Italian civil and procedural codes since many decades, the history of commercial mediation in Italy started, more or less, with the laws in favour of the creation within the Chambers of commerce, of chambers of arbitration and conciliation. Infact, Law No. 183 of 1999, titled 'Reorganisation of the chambers of commerce, industry, crafts and agriculture', stated that 'the chambers of commerce (...) carry out (...) functions and tasks relating to (...) the establishment of arbitration and conciliation commissions for the resolution of disputes between companies and between businesses and consumers and users'.

However, the real law on civil and commercial mediation in Italy, still in force with some modifications across the years, is, as said before, Legislative Decree No. 28 of 2010, titled 'Implementation of article No. 60 of the law of 18 June 2009, No. 69, in the matter of mediation aimed at reconciling civil and commercial disputes'.

According with this law, at any stage of the mediation procedure the parties may mutually ask the mediator to formulate a written proposal, and he or she is obliged to issue a non-binding proposal for the 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 is 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.

From the late 1990s through 2016 the Italian system has undergone five different civil and commercial mediation regulatory phases, described as follows.

From the late 1990s to 2004: fully voluntary mediation without any regulation for mediation entities.

From 2005 to 2011: fully voluntary mediation before accredited mediation body, for company disputes.

From 4 March 2011 to 20 October 2012: fully mandatory mediation for disputes in certain civil and commercial matters; and voluntary mediation for all the others matters upon disposable rights (Legislative Decree No. 28/2010).

From 20 October 2012 to 20 September 2013: fully voluntary mediation for all civil and commercial disputes (there was a declaration of unconstitutionality of LD. No. 28/2010).

From 20th September 2013 to date: introduction of a preliminary mediation meeting (rehabilitation of the LD. No. 28/2010, integrated and updated).

Nowadays, four different types of civil and commercial mediation are established by law.

Voluntary
when mediation is freely chosen by the litigants. It is possible in every civil and commercial dispute concerning disposable rights.

Judicial (court-ordered)
When judges, at their discretion, can order the parties of a judicial proceeding (even for non mandatory cases), at any stage of the proceeding, but before the closing arguments or the oral discussion of the pleadings (even in the Court of Appeal), to attempt mediation, giving them 15 days to choose a mediation provider.

Ex contractu
When the mediation attempt in the case of a dispute is written in a clause of a commercial contract among parties or in a company statute. Parties must attempt mediation before they can arbitrate or file a dispute in court.

Mandatory
When a preliminary and mandatory mediation attempt is imposed by law and becomes a condition precedent to bringing a suit in court.

Before the new Legislative Decree, some Italian laws required a prior mediation attempt in certain disputes in various sectors from the 1990s. For instance, 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.

The actual system of civil and commercial mediations is based on a mandatory mediation principle. In fact, for some described matters of conflict legislative Decree No. 28/2010 prescribes an obligation to (preventively) participate on a mediation attempt.

The obligation lasts 90 days; after that the parties are free to go before the court (although the procedure can be extended upon the consent of both of the parties).

Domestic mediation law

3 | Are there any domestic laws specifically governing mediation and its practice?

ADR methods have generally been known in Italy for a long time, but mediation in particular has only started to receive attention in its development as a serious means of extrajudicial dispute resolution over the past 20 years or so, in which the Italian legislator started to produce laws in favour of extrajudicial methods to solve civil and commercial disputes.

Italy 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 Nos. 180/2010 and 145/2011.

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

On 3 September 2015 Legislative Decree No. 130/2015 came into force, implementing Directive 2013/11/ EU on alternative dispute resolution for consumer disputes, and adapting it to the various ADR procedures already present in consumer affairs.

The entry into force of Decree No. 130/2015 also modifies Decree No. 28/2010 and the manner in which the mediation centres that are currently registered with the Italian Ministry of Justice should carry out mediations between professionals or companies and consumers.

Legislative Decree No. 130/2015 made changes and additions to Decree No. 206/2005, better known as 'Consumer Code', with the inclusion of 'Title II-bis – extrajudicial disputes resolution' (article 141 to 141-decies), which regulates the procedural methods for ADR procedures.

In practice, ADR helps consumers to resolve disputes with commercial traders when problems arise with a purchased product or service; for instance, if the seller refuses to repair a product or to make a refund to which the consumer is entitled.

It should be noted that under article 141, paragraph 10, the consumer will not be deprived of the right of appeal to the competent court, whatever the outcome of the court settlement before the ADR entity. Before Legislative Decree No. 28 of 4 March 2010 (updated by Decree-Law No. 69 of 21 June 2013, converted by Law No. 98 of 9 August 2013), 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 their main office. At the mediation proceedings the provisions of Legislative Decree No. 28/2010 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 Consumer Code provides that the duration of the procedure is limited to 60 days (the 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 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 states 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 the following:

- 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).

One change 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.

About civil and commercial mediation, under the prescriptions of the actual law (Legislative Decree No. 28 of 2010, and Ministerial Decree No. 180 of 2011) there are provisions that must be considered in mediation proceedings.

Authorisation to mediate

For the purposes of Legislative Decree No. 28/2010, 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.

Need for mandatory presence of the lawyers of the parties

At the first meeting and subsequent meetings, until the end of the procedure, each party must participate with the assistance of a lawyer.

Preliminary meeting

For every type of mediation the law dictates that a mandatory preliminary meeting in which the mediator, together with the parties and their lawyers, explains to the parties the function and how to conduct the mediation. The mediator, in the same first meeting, then invites the parties and their lawyers the chance to speak, to begin the process of mediation and, if positive, proceed with the conduct of the mediation.

Duration

The mediation proceeding can last for up to three months, after which the mediation attempt can be considered to be satisfied; even if the parties – on a voluntary basis – continue to try to negotiate a possible solution.

Confidentiality

The mediation process protects confidentiality and professional secrecy.

Enforceability

The mediation agreement may become enforceable (see below).

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.

Those unable to meet costs of mediation 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 in the event of a successful mediation. In the case of failure of the mediation, the tax credit is reduced by half.

Singapore Convention

4 Is your state expected to sign and ratify the UN Convention on International Settlement Agreements Resulting from Mediation when it comes into force?

The elaboration of the UN Convention on International Settlement Agreements Resulting from Mediation, also considering the growing role that is now attributed to the mediation procedure within the national legal systems, will represent, at least in expectations, an instrument that is abstractly suitable to give to the institute the dignity and relevance in the international sphere om a par with that enjoyed by arbitration for a long time.

Given these assumptions, it is highly presumable that the Italian government will also sign and ratify this Convention.

Incentives to mediate

5 To what extent, and how, is mediation encouraged in your jurisdiction?

The existing law on civil mediation prescribes that the Ministry of Justice ensures, through the Department of Information and Publishing of the Prime Minister and with funds provided by law, the promotion of mediation to the public through special advertising campaigns, particularly via internet. This information has to focus on the mediation procedure and on the providers authorised to carry it.

Moreover, as said before, the Italian legislator has provided some benefits to encourage the use of mediation.

Following a grant of enforceability, the mediation agreement (attached to the mediation report) will be enforceable for: compulsory expropriation, enforcement for satisfaction and release, the satisfaction of obligations, as well as the registration of a judicial mortgage or lien.

The procedure entitles the parties to some tax and economic benefits. In fact, all the documents needed during mediation are exempt from any stamp taxes.

In the case of mediation agreement, the parties will receive a tax credit up to €500 and in the case of a failure to mediate, the tax credit will be reduced to €250.

Moreover, any mediation agreement with a value below €50,000 is exempt from transfer taxes.

Sanctions for failure to mediate

6 Are there any sanctions if a party to a dispute proposes mediation and the other ignores the proposal, refuses to mediate or frustrates the mediation process?

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 the following:

- co-ownership of land;
- property rights;
- division of assets;
- hereditary succession;
- family agreements;
- leasing;
- loans;
- commercial leases;
- medical and paramedical liability;
- defamation;
- insurance; and
- banking and financial agreements.

The parties, in those cases, must first attempt to resolve their disputes through mediation (with the mandatory assistance of lawyers) 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 must 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, 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, within a maximum of 15 days, by which the parties should request mediation by an accredited provider.

Prevalence of mediation

7 How common is commercial mediation compared with litigation?

In the past 10 years or so, the use of civil and commercial mediation has increased, thanks also to the greater diffusion of the instrument, and to the 'softening' of the lawyers who have started to observe mediation less critically than in the past.

The Ministry of Justice regularly publishes statistics regarding civil and commercial mediations in Italy.

The new data for 2018 is derived from 597 responding existing mediation bodies.

There were 258,786 new cases of mediation registered, which is in line with the data from 2017 (263,263). Among the controversies mostly treated in mediation were those related non mandatory mediations (15.9 per cent), property rights (15,5 per cent), bank contracts (15.4 per cent) and condominium (13.5 per cent).

The adhering party appeared in 45.9 per cent of cases and, when the parties agreed to sit at the mediation table after the first meeting (the preliminary meeting), a settlement agreement was reached in 44.8 per cent of cases (all data is in line with previous surveys).

Among the disputes to which there was a higher percentage of an appearance of the adhering party were those concerning relations between relatives (wills and inheritance: 66 per cent; family covenants and agreements: 60.7 per cent; partition: 59.8).

The adhering party appeared in 58.2 per cent of disputes relating to property rights, 53.4 per cent of condominium disputes, and 53,3 per cent of lease disputes, while the percentage dropped to approximately 49.6 per cent in the event of bank contracts; to 44,5 per cent in terms of financial contracts and 44,6 per cent in terms of damages from medical liability; and to only 14,1 per cent in terms of insurance contracts.

With regard to lawyers attending mediation: in voluntary mediations, 76 per cent of applicants were assisted by their lawyer, while this was 90 per cent for the adhering parties.

It is important to remember that from 21 September 2013 the assistance of parties by lawyers is mandatory for all mandatory mediations.

As for the length of the mediation, compared to an average of 882 days relating to a dispute in court (2016 data), the average mediation procedure, with an appearance by the adherent and agreement, lasted 142 days (a little bit more compared with 2017 data: 129 days).

MEDIATORS

Accreditation

8 Is there a professional body for mediators, and is it necessary to be accredited to describe oneself as a 'mediator'? What are the key requirements to gain accreditation? Is continuing professional development compulsory, and what requirements are laid down?

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. 28/2010.

Civil and commercial mediation attempts must be carried out by professional and independent mediation providers and mediators, accredited by the Italian Ministry of Justice, and inserted in two registries maintained and controlled by the same Ministry.

The two registries are public and are updated constantly to show to the public of users all the mediation providers and mediators working under the law all around Italy.

Formal registration with the Ministry of Justice, then, 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's 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.

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:

- he or she must not have a criminal record;
- he or she must not be permanently or temporarily disqualified from public office;
- he or she must not be the subject of preventive or security measures or safety; and

- he or she must not have been the subject of 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: sign a declaration of impartiality; notify the mediation provider and to the parties all the reasons for possible damages to the impartiality; and respond to any organisational request of the mediation body.

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; and
- 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.

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

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 EU Directive 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. 28/2010, there is a two-tier system in Italy, whereby 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.

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 as follows:

- 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 as follows:

- Concilia (www.conflictresolution.it), which, since 1999, has provided training and consultancy services in civil and commercial negotiation, mediation, conciliation and arbitration, as the leading Italian ADR provider. 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. Among other things, Concilia houses the headquarters of the Italy Professional Chapter of Mediators Beyond Borders International and has been nominated as the first and unique Italian qualifying assessment programme by the Independent Standard Commission of the International Mediation Institute;
- Conciliatore BancarioFinanziario (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); and
- ADR Commercialisti, created by the National Council of Accountants with multiple offices in Italy (www.adrcommercialisti.it).

Liability

9 What immunities or potential liabilities does a mediator have? Is professional liability insurance available or required?

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 that 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, or 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 if they 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 who have a system of monitoring 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 a 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.

Mediation agreements

10 | Is it required, or customary, for a written mediation agreement to be entered into by the parties and the mediator? What would be the main terms?

All civil and commercial mediations must end with a written report to which, where the parties have reached an agreement, must be attached the text of the mediation agreement.

Although the first document is composed by the mediator and has to be signed by all the intervenients in mediation; the second document could be drafted directly by the parties and their lawyers and, anyhow, it is signed only by the parties and their legal counsel (not the mediator).

The mediation agreement must generally contain: the names, references, and identification (via the identification document number) of the parties; the settlement and negotiation clauses with which the parties make each other concessions for the purpose of resolving the dispute; any penalty clauses in the event of breach of the contract; any clauses of recourse to mediation in the event of new problems arising from the mediation agreement; the place and date of drafting of the contract; the signing of the parties to the agreement; and the signing of the parties' attorneys who, as already mentioned, sign the agreement in order to certify the absence of clauses contrary to the public order and mandatory rules.

Appointment

11 | How are mediators appointed?

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.

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 professional competences, also derived from the type of university degree held, besides other factors of competence and professionalism.

As mentioned above, at the time of his or her appointment the mediator 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.

Conflicts of interest

12 | Must mediators disclose possible conflicts of interest? What would be considered a conflict of interest? What are the consequences of failure to disclose a conflict?

First of all it is important to observe that the law prescribes that the mediator and any co-mediators may not assume rights or obligations related, directly or indirectly, to the mediation they oversee, and they may not receive monetary compensation directly from the parties; that's because the payment must be made directly to the mediation provider.

Before every mediation, the appointed mediator must: sign a declaration of impartiality (failing which, the proceeding cannot be activated); notify the mediation provider and to the parties all the reasons for possible damages to the impartiality; and respond immediately to any organisational request of the mediation body.

During the procedure, the mediator must operate in an impartial manner and, as far as possible, appear to be impartial (article 2.2 of the European Code of Conduct for Mediators);

At any time, he or she must inform, without delay, the conciliation body of any criticality profile that could compromise the equidistance or even just the 'impermeability' from any suspicion.

He or she must refuse the designation in the presence of the causes of incompatibility established by the regulation of the conciliation body to which it has adhered or when required by the provisions to protect the good repute of the legal profession (if the mediator is also a lawyer).

Moreover, lawyers mediators must not take on the role of mediator if, in the past two years, they have had professional relationships with one of the parties, or where one of their partners, associates or professionals working in the same premises have established similar relationships (article No. 62 of the Code of Forensic Ethics).

Upon request of one of the parties, the responsible of the mediation provider will provide for the replacement of the mediator. The mediation rules of the chosen ADR provider shall identify the person responsible for selecting a replacement in the event that the mediation is carried out by the responsible party of the mediation provider.

The law (Ministerial Decree No. 180 of 2010) establishes, among other things, that in case of repeated breach of the obligations of the mediator, the Ministry of Justice arranges the suspension and, in the most serious cases, the cancellation of the mediation body (and consequently also of the mediator) from the register of the organisms acclaimed to the same ministry. Consequently, that body and that mediator will no longer be able to exercise their work .

Fees

13 | Are mediators' fees regulated, or are they negotiable? What is the usual range of fees?

For mediation mandated by law, there is an identical tariff for both public and 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.

No compensation is due, in any case, by any party who is eligible for the free legal aid provided by law.

The mediator is paid by the provider, with a percentage of the fee (usually from 30 per cent to 50 per cent) that the parties pay to the same provider.

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

PROCEDURE

Counsel and witnesses

14 | Are the parties typically represented by lawyers in commercial mediation? Are fact- and expert witnesses commonly used?

Apart from the obligation by law (Legislative Decree No. 28/2010) of the presence of the party's lawyer in mandatory attempts of mediation, 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. 28/2010. 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 the 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 three months of filing the mediation before an accredited provider).

Some mediation providers stipulate in their mediation rules that individuals must personally participate in the mediation process with the mandatory presence of a personal lawyer (in cases of mandatory attempts of mediation), being able to be assisted by other professionals 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. For non-binding attempts of mediation, some mediation rules require the assistance of an attorney for each party for mediations the value of which 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.

Procedural rules

15 | Are there rules governing the mediation procedure? If not, what is the typical procedure before and during the hearing?

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 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;
- the new law provides for the obligation of assistance of lawyers for all the parties involved in a mandatory mediation attempt. In these cases, the presence of the lawyers of the parties is mandatory for all the phases of the mediation procedure until the end;
- the new addition to Legislative Decree No. 28/2010 introduced the necessity of a 'preliminary meeting' before starting the mediation. For every type of mediation the law orders a mandatory preliminary meeting in which the mediator, together with the parties and their lawyers, explains to the parties the function and how to conduct the mediation. The mediator, in the same first meeting, then invites the parties and their lawyers to discuss the prospects of beginning the mediation process and, if positive, to proceed with the conduct of the mediation; and
- after this point, if the parties reached a positive accord to start the mediation proceeding, two different scenarios are possible, depending on the choices of the parties to the mediation, as follows:
  - 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, by the mediator and by the lawyers of the parties; and
  - 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.

Tolling effect on limitation periods

16 | Does commencement of mediation interrupt the limitation period for a court or arbitration claim?

When the request for mediation is communicated to all the parties convened in the mediation, it interrupts the time line 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 limitation that starts from the filing of the report of failure to media

Enforceability of mediation clauses

17 | Is a dispute resolution clause providing for mediation enforceable? What is the legal basis for enforceability?

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.

With the novelties introduced in the text of the above-mentioned Legislative Decree No. 28/2010 by Decree-Law No. 69 (converted by Law No. 98 of 9 August 2013), where all the parties that have acceded to the mediation are assisted by a lawyer, the agreement that has been signed by the parties and by the same lawyers, is automatically enforceable for: compulsory expropriation; execution for delivery and release; performance of the obligations of dos and don'ts; and recognition of judicial mortgage.

Lawyers witness and certify the compliance of the mediation agreement to mandatory rules and public policy.

In all other cases the agreement attached to the minutes is approved, on request of a party, by a decree of the president of the court, subject to verification and approval of compliance with mandatory rules and public order. In cross-border disputes, the mediation minutes are approved by the chief judge of the district in which they are to be performed.

Confidentiality of proceedings

18 | Are mediation proceedings strictly private and confidential?

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

In addition, Legislative Decree No. 28/2010 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. Further, 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. 28/2010, 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 2008/52/EC.

Success rate

19 What is the likelihood of a commercial mediation being successful?

From the last data of the Statistical Office of the Ministry of Justice (2018), it can be seen that in general, a mediation agreement was reached in 43 per cent of voluntary mediation cases, 26 per cent of mandatory mediation cases and 19 per cent of court-assigned cases.

The percentage of proceedings that end with an agreement, when the parties agree to sit at the mediation table even after the first free meeting (which is not yet to be considered as mediation), is the following for any subject in which the mediation attempt is required by law:

- property rights: 57 per cent;
- family agreements: 53 per cent;
- loans: 51 per cent;
- division of assets: 47 per cent;
- leasing: 50 per cent;
- hereditary succession and commercial leases: 44 per cent;
- defamation: 39 per cent;
- condominium: 36 per cent;
- financial agreements: 30 per cent;
- medical and paramedical liability: 25 per cent;
- insurance: 24 per cent; and
- banking agreements: 15 per cent.

SETTLEMENT AGREEMENTS

Formalities

20 Must a settlement agreement be in writing to be enforceable? Are there other formalities?

After a negotiation period, if the parties are able to reach an agreement, the mediator drafts the minutes of the meeting, which must be signed by the mediator, the parties and their lawyers.

The (real) mediation agreement will follow, signed by the parties (with the proper power of attorney, if needed) and their lawyers, and will be attached to the previous document.

Parties' lawyers give, with their subscriptions, value of enforceability to the mediation agreement attached to the mediation report, certifying that the agreement complies with the mandatory rules and public order.

In voluntary mediation cases when the parties are not assisted by lawyers, or in any other case when the mediation agreement is not signed by the lawyers, to be enforceable the mediation minutes must be homologated by the President of the Court with jurisdiction over the dispute.

The request for enforceability must be made by the parties by depositing the mediation minutes and the attached mediation agreement.

Before granting enforceability, the President will verify the non-contrariness to the mandatory rules and the public order, and check for compliance with formalities.

In cross-border disputes the chief judge of the district in which mediation agreement has to be performed will be the competent party.

Challenging settlements

21 In what circumstances can the mediation settlement agreement be challenged in court? Can the mediator be called to give evidence regarding the mediation or the alleged settlement?

A mediation settlement agreement can be challenged in court in all cases where a contract can be challenged by law: fraud, violence, gross negligence, etc.

The law says that the mediator and whoever provides work or services for the mediation provider or to any part of the mediation procedure are strictly obliged to maintain confidentiality with respect to the statements made and information acquired during the proceedings.

The mediator cannot be required to testify before the courts or before other authorities regarding the content of the statements made and information obtained in the mediation procedure. The provisions of article No. 200 of the Criminal Procedure Code, and the guarantees provided for legal counsel by the provisions of article No. 103 of the same code are extended, as applicable, to the mediator.

In addition, the statements made or information acquired, even in part, in the course of the mediation procedure, cannot be used in a trial on the same issues, initiated or reinstated after the failure of mediation, unless by consent of the declarant or of the person from which the information originated.

Additionally, the same statements and information may not be admitted as oral testimony and cannot be the subject of a decisory oath.

Enforceability of settlements

22 Are there rules regarding enforcement of mediation settlement agreements? And on what basis is the mediation settlement agreement enforceable?

As already indicated, if the mediation ends with an agreement between the parties, a mediation agreement must be drawn up. This document, also signed by the parties' lawyers, acquires 'power' of executive title. For further specifications, see above.

STAYS IN FAVOUR OF MEDIATION

Duty to stay proceedings

23 | Must courts stay their proceedings in favour of mediation?

Before the law in force, judges were not permitted by law to refer cases to mediation. They could 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) could (and can) the judge promote mediation, or refer the parties to a public or private mediation centre.

The new law provides that the court, even in court of appeal, after considering the nature of the case, the state of education of the case and the behaviour of parties, may order the parties to try to mediate. In these cases, the mediation is 'a condition of admissibility' of the proceedings, including during the appeal proceedings, but judges may not specify the mediator or the mediation provider (pursuant to Legislative Decree No. 28 of 4 March 2010).

As for court-annexed mediations, generally speaking, Italian legislation does not provide for a real integration of mediation into court proceedings.

That said, a judge may try to mediate among the parties at every stage and degree of the civil and commercial proceeding headed by him or her.

In some cases (minor proceedings, divorce, etc) the judge can try to mediate before going on, but a true system of court-annexed mediation has not yet been provided for by law.

However, a certain degree of integration between mediation and trial was provided by Legislative Decree No. 28/2010, which states that some activities undertaken (or not undertaken) in mediation have an impact (positive or negative) on the possible subsequent judicial proceedings.

MISCELLANEOUS

Other distinctive features

24 | Are there any distinctive features of commercial mediation in your jurisdiction not covered above?

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

However, 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 (such as Concilia, some chambers of commerce, 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.

Even if there is the possibility, it is not very common that an arbitrator will wish to transfer arbitration cases to mediation, losing the possibility of continuing the arbitration procedure.

Some ADR providers (such as Concilia) use other ADR techniques, such as adjudication, expert determination and peace dialogue tables. These kinds of ADR are used for specific cases and, generally, upon request.

Regarding the use of online dispute resolution in Italy, the practice of using the internet and computers to try to solve disputes in mediation or arbitration has been known for many years in the Italian ADR system.

That said, it is important to know that the use of ODRs is not widespread or used frequently in Italy. In fact, only the major ADR providers have electronic ADR programmes that enable disputes to be solved in a virtual environment. One of the laws on mediation (specifically Ministerial Decree No. 180/2010, recently updated) regarding the possibility of the use of electronic means in mediation indicates that the mediation rules of every ADR provider accredited by the Ministry of Justice cannot provide that access to mediation takes place exclusively through electronic means.

In any case, to manage online mediations, the mediation provider must have an electronic program that has been prepared with all the protocols and security measures established by the competent department of the Ministry of Justice. Therefore, the use of platforms such as Skype or those of a similar type is prohibited.

At present, there are some measures implementing European ODR legislation, and some ADR-ODR Providers have started to mediate online, using the e-mediation Platform of the EC. To use it it is necessary to be accredited to some public authorities (as, for example, the Italian Authorities for the Guarantee of the Telecommunications, etc), and the ADR-ODR Provider must have a specific list of consumer's mediators.

Some ADR providers specialise in creating dispute management systems for companies. However, mediation in civil and commercial matters must always follow the directions of Legislative Decree No. 28/2010.

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.

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.

Regarding mediation clauses it must be said that more and more in Italy, especially in the business world, during the drafting of contracts, particular attention is drawn to the inclusion of ADR clauses that may foresee only mediation or only arbitration, or they can be multi-step, providing the classic triad of negotiation, then mediation, then arbitration.

A classic example of a multi-step contract clause is the following mediation-then-arbitration clause:

> *Every dispute arising under or connected to this contract will first be object of an attempt of mediation procedure in accordance with the Mediation Rules of Concilia LLC, a company registered at the Italian Ministry of Justice, at No. 8 of the Register of the institutions delegated to handle civil and commercial mediation attempts. The seat of the mediation will be [...] [city]. Mediation rules, forms and*

table of fees currently in force at the beginning of the mediation procedure are available on the website www.conflictresolution.it. If the dispute is not resolved within (90) days from the deposit of the request of the mediation procedure, the dispute shall be settled by arbitration – under the Rules of Arbitration of Concilia LLC in force at the moment of activation of the arbitration, available on the website www.conflictresolution.it.

- *The Arbitral Tribunal will consist of a sole arbitrator (or: three arbitrators) appointed pursuant to those Rules.*
- *The arbitration will be formal (or informal).*
- *The Arbitral Tribunal will decide in accordance with the rules of law of (...) (or: ex aequo et bono).*
- *The seat of the arbitration will be (...)*
- *The language of the arbitration will be (...)*
- *The decision of the arbitrator (arbitrators) will be final and binding on the parties.*

UPDATE & TRENDS

Opportunities and challenges

25 What are the key opportunities, challenges and developments which you anticipate relating to mediation in your jurisdiction?

Although with great slowness and with great effort, mediation is now finally entering the DNA of individuals and companies.

It is, therefore, conceivable that the legislator, who was aware of this, could continue on his path of implementing the regulation of civil and commercial mediation.

In the near future, some matters could be removed from those for which the attempt to mediate is required by law: banking, financial and insurance disputes.

While other matters could be included in the list of obligatory ones: disputes between companies, between companies and shareholders, board of directors and shareholders' meetings; disputes concerning the recovery of credit by professionals; and other types of disputes.

Still in the near future, the preliminary mediation meeting could be eliminated in favour of a more streamlined procedure.

Moreover, it is hoped that mediators' training courses will be reviewed and updated, providing more training hours than the current ones.

Furthermore, it is thought that more controls are needed both on mediation bodies and on mediators' training institutes.

Finally, to incentivise the use of mediation more and more, a regulatory provision could be envisaged in the short term to provide tax relief and tax breaks for lawyers who assist their clients in mediation.

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